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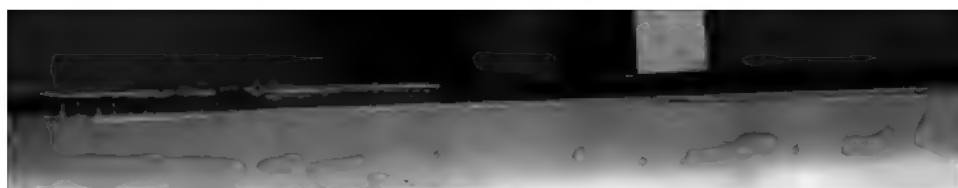
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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

LORD CHANCELLOR COTTENHAM.

BY

FREDERICK JAMES HALL & PHILIP TWELLS, ESQRS.,
BARRISTERS-AT-LAW.

VOL. I.

1849.—12 & 13 VICT.

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1850.



LORD COTTENHAM, *Lord High Chancellor.*

LORD LANGDALE, *Master of the Rolls.*

SIR LANCELOT SHADWELL, *Vice-Chancellor of England.*

SIR JAMES L. KNIGHT BRUCE	}	<i>Vice-Chancellors.</i>
SIR JAMES WIGRAM		

SIR JOHN JERVIS, *Attorney-General.*

SIR JOHN ROMILLY, *Solicitor-General.*

A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME.

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.		Blackmore v. Smith - - 155	
ABERNETHY v. Hutchinson	28	Brooke (Lord) v. The Earl of	
Agriculturist Cattle Insur-		Warwick - - -	142
ance Company, <i>In re</i> ,		Brookman, <i>In re</i> - -	435
<i>Ex parte</i> Spackman	- 229	Brown, <i>In re</i> - - -	348
Albert (Prince) v. Strange	- 1	C.	
Alchin, <i>In re</i> - -	214, n.	Cambridge and Colchester	
Allfrey v. Allfrey -	179	Railway Company, <i>In</i>	
Anstie, <i>In re</i> - -	313	<i>re</i> , <i>Ex parte</i> Marsh -	578
Att.-Gen., Berry v. -	520	Chester (Corporation of),	
_____ v. Chester (Corpo-		Att.-Gen. v. - -	46
ration of) - -	46	Christ's Hospital v. Grainger	533
_____ v. Jones - -	493	Clegg v. Fishwick - -	390
_____ v. Ludlow (Corpo-		Cohen v. Wilkinson - -	554
ration of) - -	216	Cole v. Scott - - -	477
_____ v. Munro - -	457	Copper Miners' Company,	
Auberey, <i>In re</i> - -	215, n.	Lord v. - - -	85
B.		Coward, The London and	
Baker, Mosley v. - -	301	South-Western Railway	
Barber, <i>Ex parte</i> , <i>In re</i> The		Company v. - - -	377, n.
London and Manches-		Craddock v. Piper - -	617
ter Direct Independent		D.	
Railway Company -	238	De Visme v. De Visme -	408
Bartholomew's Trust, <i>In re</i> -	565	Direct London and Exeter	
Beardmer v. The London and		Railway Company, <i>In</i>	
North Western Railway		<i>re</i> , <i>Ex parte</i> Hollings-	
Company - - -	161	worth - - -	587
Berry v. Att.-Gen. - -	520	Dixon, Mangles v. - -	542
Berwick-upon-Tweed (Cor-		Dyce Sombre, <i>In re</i> - -	285
poration of) v. Murray -	452		

	<i>Page</i>		<i>Page</i>
E.		Hunter <i>v.</i> Nockolds -	644
Edwards, Hyde <i>v.</i> -	552	Hutchinson, Abernethy <i>v.</i> -	28
Elliott <i>v.</i> Lyne -	436	Hyde <i>v.</i> Edwards -	552
F.		I.	
Ferguson, Sainter <i>v.</i> -	383	Insall, Pimm <i>v.</i> -	487
Fishwick, Clegg <i>v.</i> -	390	Iredale, <i>In re</i> -	254
Fitch <i>v.</i> Rochfort -	255		
Forbes, Stewart <i>v.</i> -	461	J.	
Franks, Pidding <i>v.</i> -	220	Jackson <i>v.</i> The North Wales	
G.		Railway Company -	75
Gaffee's Settlement, <i>In re</i> -	635	James, <i>Ex parte</i> , <i>In re</i> The	
Gibbard <i>v.</i> Pike -	436	Madrid and Valencia	
Glaholm, <i>Ex parte</i> , <i>In re</i> The		Railway Company -	597
North of England Joint-		Jee, Underwood <i>v.</i> -	379
stock Banking Company	121	Johnston, Salkeld <i>v.</i> -	329
Goodwin, <i>Ex parte</i> , <i>In re</i> St.		Jones, Att.-Gen. <i>v.</i> -	493
Catharine Hall, Cam-		——, New <i>v.</i> -	632, n.
bridge -	601		
Graham <i>v.</i> Maxwell -	247	K.	
Grainger, Christ's Hospital <i>v.</i>	533	Kent, <i>Ex parte</i> , <i>In re</i> Moore	214
Gray, Ridgway <i>v.</i> -	195		
Great Western Railway Com-		L.	
pany, M'Intosh <i>v.</i> -	41	Lewes, <i>In re</i> -	123
Guy, Stiles <i>v.</i> -	523	Life, Watson <i>v.</i> -	308
H.		London and Manchester Di-	
Hall, <i>Ex parte</i> , <i>In re</i> The		rect Independent Rail-	
North of England Joint-		way Company, <i>In re</i> , <i>Ex</i>	
stock Banking Company	580	<i>parte</i> Barber -	238
Harwood, <i>In re</i> -	572	London and North Western	
Hawthorn, <i>Ex parte</i> , <i>In re</i>		Railway Company,	
The North of England		Beardmer <i>v.</i> -	161
Joint-stock Banking		—— <i>v.</i> Smith -	364
Company -	225	London and South Western	
Hepworth, Norton <i>v.</i> -	158	Railway Company <i>v.</i>	
Hodge, Wilyams <i>v.</i> -	575	Coward -	377, n.
Hollingsworth, <i>Ex parte</i> , <i>In</i>		Lord <i>v.</i> The Copper Miners'	
<i>re</i> The Direct London		Company -	85
and Exeter Railway		Ludlow (Corporation of),	
Company -	587	Att.-Gen. <i>v.</i> -	216
		Lyne, Elliott <i>v.</i> -	436

TABLE OF THE CASES.

vii

	Page		Page
M.		North Wales Railway Com-	
M'Intosh v. The Great West-		pany, Jackson v. -	75
ern Railway Company -	41	Norton v. Hepworth -	158
Madrid and Valencia Rail-			
way Company, In re,		O.	
Ex parte James -	597	Onslow v. Wallis -	513
Mallorie, In re -	435		
Mangles v. Dixon -	542	P.	
Mansfield (Earl of), Ex parte,		Paile v. Stoddart -	207
In re The Universal Sal-		Penny v. Watts -	266
vage Company -	593	Pidding v. Franks -	220
Marsh, Ex parte, In re The		Pike, Gibbard v. -	436
Cambridge and Colches-		Pimm v. Insall -	487
ter Railway Company -	578	Ex parte, In re The St.	
Martin, The South Eastern		George's Steam Packet	
Railway Company v. -	69	Company -	388
Maxwell, Graham v. -	247	Pincombe, Smith v. -	250
Mills, Sawyer v. -	569	Piper, Cradock v. -	617
Moore, In re, Ex parte Kent	214	Plomer, Steele v. -	149, 153
Morgan, Ex parte, In re The		Poulton, In re -	476
Vale of Neath and South			
Wales Brewery Joint-		R.	
stock Company -	320	Raincock v. Young -	197
Morgan, In re -	212	Reavely, Ex parte, In re The	
Morris, Rubery v. -	400	North of England Joint-	
Mosley v. Baker -	301	stock Banking Com-	
Moxhay, Tulk v. -	105	pany -	118
Munro, Att.-Gen. v. -	457	Ridgway v. Gray -	195
Murray, The Corporation of		Rochfort, Fitch v. -	255
Berwick-upon-Tweed v. -	452	Rubery v. Morris -	400
N.		S.	
New v. Jones -	632, n.	St. Catharine Hall, Cam-	
Nockolds, Hunter v. -	644	bridge, In re, Ex parte	
North of England Joint-		Goodwin -	601
stock Banking Company,		St. George's Steam Packet	
In re, Ex parte Gla-		Company, In re, Ex	
holm -	121	parte Pimm -	388
Ex parte Hall -	580	St. Marylebone Joint-stock	
Ex parte Hawthorn -	225	Banking Company, In	
Ex parte Reavely -	118	re, Ex parte Troutbeck -	100
Ex parte Sanderson -	486	Ex parte Walker -	100
North Staffordshire Railway		Sainter v. Ferguson -	383
Company, Wood v. -	611		

	<i>Page</i>		<i>Page</i>
Salkeld v. Johnston -	329	Universal Salvage Company, <i>In re, Ex parte</i> The Earl of Mansfield -	593
Sanderson, <i>Ex parte, In re</i> The North of England Joint-stock Banking Company -	486	V.	
Sawyer v. Mills -	569	Vale of Neath and South Wales Brewery Joint- stock Company, <i>In re,</i> <i>Ex parte</i> Morgan -	320
Scarf v. Soulby -	426	W.	
Scott, Cole v. -	477	Wade, <i>In re</i> -	202
Shrewsbury Charities, <i>In re</i> Grammar School, <i>In re, -</i> -	204, 401	Walker, <i>Ex parte, In re</i> The St. Marylebone Joint- Stock Banking Com- pany -	100
Smith, Blackmore v. -	155	Wallis, Onslow v. -	513
——, London and North Western Railway Co. v.	364	Warwick, (Earl of), Lord Brooke v. -	142
—— v. Pincombe -	250	Watson v. Life -	308
Soulby, Scarf v. -	426	Watts, Penny v. -	266
South Eastern Railway Com- pany v. Martin -	69	Welsh, <i>In re</i> -	215, n.
—— Willey v. -	56	Wheal Lovell Mining Com- pany, <i>In re, Ex parte</i> Wyld -	125
Spackman, <i>Ex parte, In re</i> The Agriculturist Cattle Insurance Company -	229	Wilkinson, Cohen v. -	554
Steele v. Plomer -	149, 153	Willey v. The South Eastern Railway Company -	56
Stewart v. Forbes -	461	Willyams v. Hodge -	575
Stiles v. Guy -	523	Wood v. The North Stafford- shire Railway Company	611
Stoddart, Peile v. -	207	Wyld, <i>Ex parte, In re</i> The Wheal Lovell Mining Company -	125
Strange, Prince Albert v. -	1	Y.	
T.		York and North Midland Railway Act, <i>In re</i> -	432
Taylor, <i>In re</i> -	432	Young, Raincock v. -	197
—— v. Taylor -	437		
Troutbeck, <i>Ex parte, In re</i> The St. Marylebone Joint-stock Banking Co.	100		
Tulk v. Moxhay -	105		
U.			
Underwood v. Jee -	379		

ORDERS IN CHANCERY.

ORDER OF COURT.

10th December, 1849.

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, *Lord High Chancellor of Great Britain*, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, *Master of the Rolls*, and the Right Honourable Sir LANCELOT SHADWELL, *Vice-Chancellor of England*, doth hereby Order and Direct in manner following, that is to say:—

That, in all cases in which Costs are ordered to be paid to a party suing or defending *in formâ pauperis*, such Costs shall, unless the Court shall otherwise order, be taxed as *dives* Costs.

Costs payable to a pauper Plaintiff or Defendant, to be taxed as *dives* costs.

That this Order be drawn up and entered by the Registrar of the said Court.

COTTENHAM, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

ORDER OF COURT.

23rd February, 1850.

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, *Lord High Chancellor of Great Britain*, doth hereby Order and Direct in manner following, that is to say:—

Causes to be set down by Registrars for hearing before *Lord Chancellor* or *Vice-Chancellor*, upon production of certificate, without fiat:

That all Causes required to be heard before the *Lord Chancellor*, or one of the *Vice-Chancellors*, shall, on and after the first day of March next, be set down for hearing by the Registrars, upon production to them of the Certificate of the proper officer that the same is in a fit state to be set down for hearing, without any Fiat, Order, or Direction from the *Lord Chancellor*, for that purpose.

And for further directions, &c. &c. on order of course, without fiat.

That, on and after the said first day of March next, all Causes for further Directions, or on Equity reserved after a Trial at Law shall have been had, or the Certificate of a Court of Law shall have been obtained, in pursuance of a Decree or Order pronounced by the *Lord Chancellor*, or one of the *Vice-Chancellors*, and all Pleas, Demurrers, Exceptions and Objections for want of Parties, required to be heard before the *Lord Chancellor*, or one of the *Vice-Chancellors*, shall be set down by the Registrars for hearing, on Orders drawn up by them upon Petition to the *Lord Chancellor*, left with the Registrar, without any Fiat or Direction from the *Lord Chancellor*.

Fees payable to the *Lord Chancellor's* principal Secretary.

That, in lieu and in stead of the Fees heretofore receivable by the *Lord Chancellor's* principal Secretary on his own account and on account of the Gentlemen of the

Chamber, or of any other Officer of the Court of Chancery, and paid at the office of the said principal Secretary, he shall receive and take only the Fees set out in the Schedule hereto, except as to all Petitions presented previous to the said first day of March next, the Court Fees upon which are to be paid as heretofore.

COTTENHAM, C.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

High Court of Chancery.

PRINCE ALBERT v. STRANGE.

1849.

Jan. 26th,
27th, 29th, &
30th.
Feb. 8th.

THIS was an application to the Lord Chancellor, upon motion on behalf of the first-named Defendant, *Strange*, that an injunction, which had been granted by the Vice-Chancellor *Knight Bruce*, to restrain *Strange*, his agents, servants, and workmen, from exhibiting the gallery or collection of etchings in the Complainant's bill mentioned, or any of such etchings, or from making or permitting to be made any engravings or copies of the same or any of them, and from in any manner publishing the same or any of them, or from parting with or disposing of the same or any of them, and from selling or in any manner publishing, and from printing, the Descriptive Catalogue in the Complainant's bill mentioned, or any work being or purporting to be a catalogue of the said etchings, until the said Defendant should fully answer the Complainant's bill, or the Court should

The maker and owner of etchings which have never been exhibited or published, and of which no impressions have been made except for his private use, but impressions whereof have, by improper and surreptitious means, come into the possession of other parties, is entitled to an injunction, not only to restrain those parties from exhibiting those impressions, and from publishing

copies of them, but also to restrain them from publishing a catalogue compiled by themselves, in which an enumeration and descriptive account of those etchings is contained, and that, although there is no violation of any contract, either express or implied, between the owner and the compilers of the catalogue.

Where A. and B. were respectively the makers and owners of several etchings, of which a catalogue was proposed to be improperly published by a person who had surreptitiously obtained copies of the etchings, and a bill was filed by A. against the publisher of the catalogue and B., A. was held to be entitled to an injunction to restrain the publication of the catalogue generally, not only so far as it related to his own etchings, but likewise so far as it related to those of B. also.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 ———
Statement.

make order to the contrary, might be dissolved, so far as such injunction restrained the Defendant *Strange*, his agents, servants, and workmen, from selling or in any manner publishing, and from printing, the Descriptive Catalogue in the Complainant's bill mentioned, or any work being or purporting to be a catalogue of the said etchings; and, if necessary, that an order, made in this cause by his Honor the Vice-Chancellor *Knight Bruce*, dated the 16th day of January instant, might be discharged or varied, as to his Lordship should seem meet.

The bill, as originally filed in October, 1848, was against *Strange* and the *Attorney-General* only; but it was afterward amended, and *Jasper T. Judge*, and his son *Jasper A. F. Judge*, were added as Defendants.

The bill stated, that the Queen and the Plaintiff respectively had occasionally, for their amusement, made drawings and etchings, being principally of subjects of private and domestic interest to themselves; and that they had made impressions of those etchings for their own use, and not for publication: that, for greater privacy, such impressions had been, for the most part, made by means of a private press kept for that purpose, and the plates themselves had been ordinarily kept by her Majesty under lock, and the impressions had been placed in some of the private apartments of her Majesty, at *Windsor*, and in such apartments only: that the Defendants, *Strange*, *Judge*, and *J. A. F. Judge*, had, in some manner, obtained some of such impressions, which had been surreptitiously taken from some of such plates, and had thereby been enabled to form, and had formed, a gallery or collection of such etchings, of which they intended to make a public exhibition, without the permission of her Majesty and the Plaintiff, or either of them, and against their will: that the Defendants had compiled and prepared a work, which had been printed and

published by the Defendant *Strange*, of which the title-page or cover was as follows: “A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings.” “Every purchaser of this Catalogue will be presented (by permission) with a fac-simile of the autograph of either her Majesty or of the Prince Consort, engraved from the original, the selection being left to the purchaser. Price sixpence:” that this work had been compiled, printed, and published without the consent of her Majesty and the Plaintiff, or either of them, and against their will: that, in fact, among the etchings were portraits of the Plaintiff, the Prince of Wales, the Princess Royal, and other members of the Royal Family, and personal friends of her Majesty; and that many of them were drawn by her Majesty from life, and afterward transferred to copper, and etched by her Majesty and the Plaintiff; and among such etchings were portraits of their favourite dogs, taken by them from life, and etchings from old and rare engravings in the possession of her Majesty, and several from such original designs as in the Catalogue mentioned; and among such etchings there were several portraits of the Princess Royal, and such scenes in the Royal Nursery as in the said Catalogue mentioned: and that the said Descriptive Catalogue comprised sixty-three several etchings.

1849.
PRINCE
ALBERT
v.
STRANGE.
Statement.

The bill then stated the Catalogue, which gave a particular account of sixty-three etchings, with critiques and observations respecting them. It commenced as follows:—
“The great interest which every loyal and affectionate subject of her Majesty cannot fail to feel in all that relates to works of art executed by her Majesty and his Royal Highness Prince Albert, has induced the proprietor of this perfectly unique and most interesting collection of etchings to submit them to public exhibition, and thus enable the whole nation to form an opinion of her Majesty’s and the Prince Consort’s merits in a branch of the fine arts, in

1846.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
 Statement.

which, as it has been admitted, it is so difficult to excel, or even to arrive at a stage beyond mediocrity.' The bill then stated, that the several etchings were so made and from such drawings as in such Catalogue was mentioned: that the Catalogue, and such descriptive and other remarks, could not have been made except by means of the possession of several impressions of the etchings so obtained and surreptitiously taken as aforesaid: that the impressions were intended for the private use of her Majesty and the Plaintiff, although copies of some of them had been occasionally, though very rarely, given to some of their personal friends, one to one friend, and one to another; but no such collection as that so advertised for exhibition as aforesaid was ever given away by them, or either of them, or by their or either of their permission, and no such collection could have been formed except of impressions surreptitiously and improperly obtained.

When the bill was amended, a charge was introduced, that certain of the plates were given to *Brown*, a printer, at *Windsor*, for the purpose of printing off certain impressions thereof for her Majesty and the Plaintiff; and that *Brown* employed therein a person of the name of *Middleton*, who, without *Brown's* consent or knowledge, and in violation of the confidence reposed in him, took impressions thereof for himself; and that *Judge* had bought, or in some manner obtained, the same from *Middleton*.

The bill prayed that the Defendants might be ordered to deliver up to the Plaintiff all impressions and copies of the several etchings respectively made by the Plaintiff; and that they, their servants, &c., might be restrained by injunction from exhibiting the said gallery or collection of etchings, or from making engravings or copies of them, or in any manner publishing them, or from parting with or dis-

posing of them ; and also from selling, publishing, or printing the Descriptive Catalogue in the bill mentioned, or any work being or purporting to be a catalogue of the said etchings; and that the copies of the Catalogue, in the possession of the Defendants, might be given up to the Plaintiff.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 Statement.

The statements in the bill were confirmed by affidavits of Prince *Albert*, Mr. *White*, his solicitor, and Mr. *Anson*. It appeared from those affidavits, that, with the exception of the occasion when the plates were sent to *Brown*, as before mentioned, they had never been out of the possession of her Majesty or the Prince; and no such collection as was advertised for exhibition had ever been given away: and the Prince stated in his affidavit, that he believed that the person in possession of the collection advertised for exhibition must have obtained them from some persons who had access to the private apartments in *Windsor Castle*, and removed the impressions therefrom surreptitiously.

On the day on which the bill was filed, an injunction was granted against *Strange* by the Vice-Chancellor *Knight Bruce*, in accordance with the prayer; which injunction was afterward, on the 6th of November, extended to the other Defendants.

An information was filed at the same time, in the name of the *Attorney-General*, on behalf of her Majesty, against Prince *Albert* and *Strange*, to a similar effect; and in that information an injunction had been obtained to restrain the exhibition, but not restraining the publication of the Catalogue.

On the 5th of December, *Strange* put in his answer to this bill. He denied that he had in any manner, either surreptitiously or otherwise, obtained any impressions of the etchings,

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
 Statement.

or copies of them. He stated, that he believed that *Judge* purchased certain impressions of the etchings from *Middleton*, one only of which had been sent to him (*Strange*) for the purpose of being mounted, which was the only impression he had ever had in his possession. He believed that *Judge* had formed a collection of the etchings; that about the end of August, 1848, *Judge* called on him, and told him he had a collection of the etchings, which he shewed to *Strange* soon after, and proposed to him to exhibit them, if her Majesty and the Prince did not object, at the *Egyptian Hall*, or some other public institution of equal respectability; that *Strange* was to advance the funds, and he and *Judge* were to divide the profits equally; that he then believed that the impressions had not been improperly obtained; that *Judge* afterward wrote the Catalogue, which *Strange* printed, but struck off fifty-one copies only, and then broke up the type: that, in October, 1848, *Judge*, with a view of bringing the subject of the exhibition to the notice of her Majesty and the Prince, and of ascertaining whether they objected to it, sent eleven copies of the Catalogue to the Queen, the Duchess of *Kent*, the King and Queen of the *Belgians*, and to some distinguished parties holding offices at Court, and that he had the remainder in his own possession; that the Catalogue had never been exposed for sale; and that, as soon as he ascertained that the contemplated exhibition was disapproved of by the Queen and the Prince, he determined to abandon the scheme, and had offered to give up all copies of the Catalogue which remained in his possession, and to take no further steps in the matter, if the bill were dismissed against him and his costs paid; that the solicitor for the Plaintiff agreed to all the other terms, but refused to pay the Defendant's costs. He insisted by his answer, that, as a matter of strict right, he was entitled to publish the Catalogue; and he submitted whether the Queen had any interest in the suit; and that the Prince had no right of property in any of the drawings or etchings, or impressions

from the same, which had been executed by her Majesty alone, or by her jointly with the Prince; and that the Prince ought to have distinguished those drawings and etchings which were his own from those which were done by the Queen.

1849.
PRINCE
ALBERT
v.
STRANGE.
Statement.

Strange did not attempt to dissolve the injunction, so far as it related to the exhibition; but in December a motion was made on his behalf, before his Honor the Vice-Chancellor *Knight Bruce*, to dissolve the injunction, so far as it related to publishing the Catalogue. That motion was refused with costs, on the 16th of January, and was now renewed, by way of appeal, before the Lord Chancellor.

Mr. *Russell*, Mr. *Rolt*, Mr. *Warren*, and Mr. *Sidney Smith*, in support of the motion. *Argument.*

The former part of the injunction, which was to restrain the exhibition of the etchings or impressions, is not now in dispute. *Strange* states, that he never had any of the etchings, or more than one of the impressions, in his possession, and therefore it is not in his power either to exhibit or to make copies of them. The only question is, his right to publish the Catalogue.

Some of the etchings in question were done, not by Prince *Albert*, but by the Queen; and the Prince has no interest in them, which will entitle him to sustain this injunction, so far as relates to those etchings. It was provided, by the statute 3 & 4 Vict. c. 3, s. 2, that the Prince should not, by virtue of his marriage, acquire any interest in any property of her Majesty.

[The LORD CHANCELLOR.—A Defendant cannot put a

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Argument.

Plaintiff in that position by publishing that which partly belongs to one and partly belongs to another, and then say, that neither the one nor the other shall move for an injunction, because the Catalogue contains matter relating to both.]

Strange has, by his answer, distinctly denied all the allegations in the bill which impute to him any fraud in obtaining the impressions, or any knowledge of any such fraud committed by others. The question, therefore, is, whether a party, who has become aware of the fact that certain etchings are in existence, is at liberty, without the consent of the owner, to publish a catalogue of them, together with the ideas which they have produced in the mind of the party who compiled the Catalogue. A person inspects, with care and attention, certain engravings; the examination of them leaves certain ideas in his mind; and the ideas which he received by those means he has materialised and embodied in a catalogue, and he now proposes to publish them to the world. Now, the engravings had been left in the apartments of *Windsor Castle*, and several had been given away. That was equivalent to such a publication, as, if it had been a mechanical discovery, would have precluded the possibility of obtaining a patent afterward.

[The LORD CHANCELLOR.—If a man communicates to a friend the particulars of a discovery or invention, could he not afterward obtain a patent?]

In this case there has been a general publication, by exhibiting and by giving away; and no precedent can be found in which this Court has granted an injunction in such a case.

The questions in which the Court has interfered, with

regard to the publication of letters and of lectures, are to some extent analogous. In *Gee v. Pritchard* (a), the *Lord Chancellor* repudiated the argument, that the publication of letters would be restrained, because their publication would be painful to the feelings of the Plaintiff; and said, "The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect." In *Abernethy v. Hutchinson* (b), an application was made to restrain the Defendants from publishing, in "The Lancet," Mr. *Abernethy's* Lectures, which had been delivered extemporally. Lord *Eldon*, at first, refused the application; but afterward granted an injunction, on the ground that there was an implied contract between him and the parties who attended his Lectures, that they should not publish them.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 Argument.

The order of the Vice-Chancellor carries the interference of the Court further than it can be supported on the principle adopted in either of those cases, namely, either on the ground of property, or on the ground that there was some implied contract that the knowledge communicated should not be made public. To support his Honor's decision, the right of property in a chattel must, independently of any contract, give an exclusive right to the use of any knowledge connected with that chattel. That is, at all events, a very doubtful question of law; and the Court will therefore refuse its interference, until the Plaintiff has established his right at law: *Spottiswoode v. Clarke* (c); *Rigby v. The Great Western Railway Company* (d). Can a right in property, to which certain knowledge relates, give an exclusive right to the use of that knowledge, independently of any contract? A confusion seems to be created by mixing up the several distinct matters which compose the whole.

(a) 2 Swanst. 413.

(c) 2 Ph. 154.

(b) 3 Law Journal, 1825,

(d) 2 Ph. 49.

Chanc., 209. See post, p. 28.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Argument.

First, there is a right of property in the canvass of a painting; and, secondly, there is a right of property in the form of the idea which adorns the canvass, and that cannot be copied. And, further, if a party is bound by any contract, he may be restrained from using the knowledge he has obtained respecting the painting, unless with the consent of the owner of the chattel. But the possessor, independently of contract, has no right or property in the idea which is acquired by another party from a knowledge of that particular chattel. If the owner of property desires it to be kept secret, and orders that strangers be not admitted to view it, yet if a servant, notwithstanding such directions, should admit an amateur to see it, could that amateur, in such a case, be prevented from describing the property in poetry or sculpture, or from illustrating it by paintings? Suppose, again, the case of a work of art being stolen from the lawful owner, and a party obtaining an inspection of it, knowing the owner's wish to keep the work secret: would the Court restrain such party from using the knowledge he had obtained by means of an examination of the work? He might describe it in poetry, or realise it in marble.

A fair use of works, which form the property of another party, either by quotation, or in making an abridgment, or for the purpose of criticism, is permitted by the Court: *Wilkins v. Aikin* (a), *Saunders v. Smith* (b), *Gyles v. Wilcox* (c), *Carr v. Hood* (d). If a party published a drawing of a house or tree belonging to another person, could the owner restrain him by an injunction, because his privacy was invaded?

It is the same principle of a contract, expressed or implied, not to divulge, which induces this Court to interfere

(a) 17 Ves. 422.

(b) 3 M. & Cr. 711.

(c) 2 Atk. 141.

(d) 1 Camp. 355, n.

in cases of medical recipes: *Youatt v. Winyard* (a), *Green v. Folgham* (b).

The cases of unprinted manuscripts, and of dramatic performances, and lectures not printed but delivered orally, all proceed on the notion of property existing, although not in a published form. If lectures be reduced into writing, there is a copyright in them. In *Macklin v. Richardson* (c), which related to the farce of "Love à la Mode," a short-hand writer took down the words from the mouths of the actors on the stage, and the Defendant afterward published them, and an injunction was granted to restrain him, on the ground that the author had not, by the public representation of the farce, parted with his exclusive right of publication. The converse of that case was *Murray v. Elliston* (d), in which a party, who was representing Lord *Byron's* tragedy of "Marino Faliero, Doge of Venice," on the stage, with some alterations from the printed tragedy, was held not liable to an action. One of the latest cases was *Tipping v. Clarke* (e), before Vice-Chancellor *Wigram*. There the Defendant had bribed the Plaintiff's agent to make extracts of false entries from the books of the Plaintiff. The Plaintiff did not move for an injunction on the Defendant's answer; but, on the cause coming on for hearing, it appeared that *Clarke* had filed another bill in the Rolls Court, and had obtained in that suit an inspection of those books; and therefore the bill was dismissed. But the principle that an agent could not be allowed to communicate the contents of his employer's books to another person, and that that person could not publish the information so improperly obtained, was directly admitted by the Vice-Chancellor. A person guilty of bribery takes the knowledge he obtains with no better right to use it than the party communicating it; but here there is neither bribery nor fraud.

1849.
PRINCE
ALBERT
v.
STRANGE.
—
Argument.

(a) 1 J. & W. 394.

(b) 1 S. & S. 398.

(c) Amb. 694.

(d) 5 B. & Ald. 657.

(e) The facts of this case are stated in 2 Hare, 383.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Argument.

The proprietor of the etchings may reasonably be desirous that a catalogue of them should not be published. The gratification felt in the possession of them may be diminished by such a proceeding. But these are matters which the law does not provide for: *Chandler v. Thompson* (a), *Southey v. Sherwood* (b). “The law does not give an action for such things of delight:” *Aldred’s Case* (c). The Vice-Chancellor’s decision was founded more on the morality of the question than on the strict legal rights of the parties: *Mackeldey’s* “Compendium of Modern Civil Law” (d).

The *Solicitor-General*, Mr. Serjt. *Talfourd*, and Mr. *W. M. James*, for the Plaintiff.

The principle upon which the Plaintiff asks for the assistance of the Court in this case is the general principle, that the Court of Chancery will protect every one in the free and innocent use of his own property, and will prevent other parties from interfering with the use of that property, so as to injure the owner. The question is, in some degree, similar to the case of copyright; but copyright exists only in that which is published. The right in this case is antecedent to any publication to the world. In *Millar v. Taylor* (e), which related

(a) 3 Camp. 80.

(b) 2 Mer. 435.

(c) 9 Rep. 58 b.

(d) Page 123. “The line of demarcation betwixt law and ethics must be strictly observed, and internal actions must not be made the objects of law. This doctrine was fully recognised by the Romans: whence the maxim, ‘*Interna non curat prætor.*’ When this fundamental distinction is violated, a door is

opened at once to the most injurious and arbitrary invasions of the rights of individuals by the ruling power: and in general, wherever the judicial power is allowed to encroach too far on the widely extended domain of moral duties, it is in danger of becoming inconsistent and unjust.”

(e) 4 Burr. 2379; see also pp. 2348, 2355, 2361, 2363, 2397.

to the publication of *Thomson's* "Seasons," Mr. Justice *Yates* differed in opinion from the other Judges, and decided against the author's copyright. He considered that copyright had nothing tangible or corporeal about it. But he made the following observations:—"It is certain every man has a right to keep his own sentiments if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state the manuscript is, in every sense, his peculiar property, and no man can take it from him, or make any use of it which he has not authorised, without being guilty of a violation of his property; and, as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority is guilty of a manifest wrong, and the Court has a right to stop it."

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Argument.

The question here is, how far the publication of this Catalogue is in violation of the law? That there is property in the ideas which pass in a man's mind is consistent with all the authorities in English law. Incidental to that right is the right of deciding when and how they shall first be made known to the public. Privacy is a part, and an essential part, of this species of property. In *Millar v. Taylor*, the property which a man had in his unpublished ideas was admitted by all the Judges: *Donaldson v. Beckett* (a).

It was contended, on the other side, that the Plaintiff, although he had a right to the etchings, had no right in the Catalogue. No such right is claimed; but the Plaintiff claims the right and advantage of making these etchings public when and how he pleases; and he complains, that the publishing of this Catalogue interferes with and injures

(a) 2 Bro. P. C. 129.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Argument.

that right. The Catalogue is merely the instrument by which the Plaintiff's property in the etchings is injured. He has no right in the instrument of mischief; but he has a right in the property to which the mischief is attempted to be done.

It was also contended, that the Plaintiff had done acts which amounted to a publication of these etchings. In *The Duke of Queensberry v. Shebbeare* (a), the representative of Lord Clarendon had given to a person, through whom the Defendant claimed, a copy of Lord Clarendon's "History of the Reign of Charles the Second;" but the Court granted an injunction to restrain the Defendant from publishing it. Therefore, the fact that an author has parted with a copy of his work does not diminish his right to be the first publisher of the original work. In *Pope v. Curl* (b), which related to Pope's "Letters," the same principle was followed by the Court.

In *Southey v. Sherwood* (c), Lord Eldon refused an injunction to restrain the publication of "Wat Tyler," because he held the work itself to be of an injurious tendency; but he maintained the principle, that, if the work had been innocent in its character, the author would have been entitled to the protection of the Court; and held, that an author had a property in an unpublished work, independently of the statute of 8 Anne, c. 19. In *Thompson v. Stanhope* (d), Lord Apsley granted an injunction, on the application of Lord Chesterfield's executor, to restrain the widow of his son from publishing letters which the son had received from Lord Chesterfield. In *Gee v. Pritchard* (e), an injunction was granted to restrain the publication of letters by the party to whom they were addressed. In *Lord and*

(a) 2 Eden, 329; see also 4 Burr. 2397.

(b) 2 Atk. 342.

(c) 2 Mer. 435.

(d) Amb. 737.

(e) 2 Swanst. 425.

Lady Perceval v. Phipps (a), the same principle was admitted; though the conduct of the parties was there held to have given the Defendant a right to publish the letters: *Earl of Granard v. Dunkin* (b). The cases which have already been referred to, of *Abernethy v. Hutchinson* (c), *Youatt v. Winyard* (d), and *Green v. Folgham* (e), and the case of *Bryson v. Whitehead* (f), are all in favour of the Plaintiff's right.

1849.
PRINCE
ALBERT
v.
STRANGE.
Argument.

Nothing which has been done by the Plaintiff with regard to the etchings or impressions from them, amounts to a publication, so as to authorise any other party to publish an account of them. In *Macklin v. Richardson* (g), and *Coleman v. Walker* (h), the public representation of theatrical pieces was held not to amount to publication. In *Martin v. Wright* (i), the Defendant had made a greatly enlarged copy of *Martin's* picture of "Belshazzar's Feast," in order to represent it with what he called a dioramic effect: the Court did not grant an injunction to restrain such an exhibition, but the picture had already been made public by the artist. Suppose, however, that, in that case, the Defendant had, by some means, got access to *Martin's* studio, and had, in that manner, got information which enabled him to make such an exhibition before the artist had exhibited it, would not this Court have restrained him? It has been contended, that, if a man obtained knowledge of the invention of another person by bribing his servant, this Court would not interfere to prevent the party from making the invention public. There can be little doubt that this Court would instantly restrain him: *Eden on Injunctions* (k). For

(a) 2 Ves. & B. 19.

(b) 1 B. & B. 207.

(c) See post, p. 28.

(d) 1 J. & W. 394.

(e) 1 S. & S. 398.

(f) 1 S. & S. 74.

(g) Amb. 694.

(h) 5 T. R. 245.

(i) 6 Sim. 297.

(k) Page 275, where reference is made to the case of Mr. *Webb*, whose *Precedents in Conveyancing* were stolen out of his chambers; and to the case of Mr.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Argument.

instance, if a party had obtained an inspection of Mr. *Macaulay's* "History of England" before the author had published it, he would not have acquired a right to make a translation of it into a foreign language, or to publish an abstract of it. But when the work is once published, anybody may do either of those things. As to illustrating a book by pictures, if a book is not yet published, and another party publishes illustrations of it, with short accounts which convey the same ideas as the book, this Court would certainly restrain him from such an infringement of the rights of the author of the book.

The publication of a drawing of a house or a tree in a park, which are necessarily public, and may be seen by anybody, does not apply to this case. But, take the case of valuable marbles brought to this country from the East, which possess no beauty of art, and are valuable only for the inscriptions on them; the party who purchases them, purchases also the right of being the first to publish an account of them; and no other person, who happens to have seen them, would be allowed to publish a descriptive account of them, against the consent of the owner.

In this case, no consent was given to the publication. The copies were either dishonestly obtained from the Palace, or were improperly retained by *Brown*. There was either a breach of confidence, or a positive crime committed, to obtain them. The principle is laid down in *Bridgeman v. Green* (a), where the question was, whether certain money, which had been obtained by fraud, ought to be returned to the Plaintiff by a party who had received it, but who was not a party to the fraud. Lord Commissioner *Wilmot* said, "Whoever

Forester, whose notes were copied by the clerk of a gentleman to whom he had lent them: in both which cases injunctions were

granted to restrain the publication of the works so improperly acquired.

(a) Wilm. Rep. 65.

receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it come through a corrupt, polluted channel, the obligation of restitution will follow it."

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Argument.

Suppose a party is aware of a defect in a title, he may be restrained from making it public: *Cholmondeley v. Clinton* (a). If a party engages to publish a certain number of copies of a book, he is not justified in keeping back any copies and selling them for his own benefit.

As to the conduct of the parties, if, as they allege, they do not wish to publish the Catalogue, why do they raise this question before the Court? And if they wished to ascertain whether her Majesty's permission might be obtained for the publication, why was it necessary to forward catalogues to the King and Queen of the *Belgians*?

The Catalogue also, which announces that the exhibition is to take place, alleges, that the autographs are to be given away "by permission;" which is a deception on the public, who would necessarily infer, that the exhibition, and the publication of the Catalogue, and the giving away of the autographs, had all received the sanction of the Queen and Prince *Albert*.

Mr. *Russell*, in reply—

Admitted the right which an author has in his unpublished manuscripts; but insisted that there was no case which carried the law so far as to hold that an abridgment

(a) 19 Ves. 261.

1849.

PRINCE
ALBERT
v.
STRANGE.

—
Argument.

might not be made of an unpublished manuscript without the consent of the owner. If a person read a poem to his friends, they would not be precluded from saying they had heard such a poem.

[The LORD CHANCELLOR.—In *Abernethy's case*, Lord *Eldon* required affidavits that there was no publication—no dedication to the public—except by the Lectures, which was only a qualified publication.]

That would be a case of contract or of injury to property. The etchings were not injured by the description given of them by this Catalogue. If a surveyor obtained knowledge of the levels of a person's property against his will and by committing a trespass, could the Court restrain him by injunction from using that knowledge for the purposes of a railway, and to the annoyance of the owner of the land?

As to any deception practised on the public by alleging that the autographs were given "by permission," the Court would not interfere upon that ground. In *Clark v. Freeman* (a) the Court would not restrain a party from selling pills which were falsely alleged to be Sir *James Clark's* pills. The Court would not interfere to prevent a man from selling his own articles, because he was deluding the purchaser to think they were the articles of somebody else.

[The LORD CHANCELLOR.—Sir *James Clark* was not himself the maker or seller of any pills. If he had been, he would probably have got an injunction.]

Feb. 8th.

—
Judgment.

The LORD CHANCELLOR:—

The importance which has been attached to this case arises entirely from the exalted station of the Plaintiff, and

(a) 17 Law Journal, Chanc., 142.

cannot be referred to any difficulty in the case itself. The precise facts may not have occurred before; but those facts clearly fall within the established principles, and the application of them is not attended with any difficulty.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Judgment.

The right of the Plaintiff to an injunction restraining the Defendant from exhibiting, copying, or in any manner publishing, or parting with, or disposing of any of the etchings in question, is perfectly clear from the facts of the case, and is not now disputed by the Defendant; and the only question I have to decide is, whether, this right being so established and admitted, the Defendant is to be permitted to publish the Catalogue in question, in which he announces his intention of exhibiting the etchings, which he is so restrained from doing; and in which he announces to the public that “every purchaser of this Catalogue will be presented (by permission) with a fac-simile of the autograph of either her Majesty or of the Prince, engraved from the original, the selection being left to the purchaser.” Now, as permission so to accompany each Catalogue sold, necessarily implies permission to sell the Catalogue itself, the case is complete of an intention to sell under a false representation that the whole transaction is not only with the knowledge but with the approbation of the Plaintiff;—a falsehood which could only have been resorted to for the purpose of imposing on the public.

All manufacturers are, as a matter of course, restrained from selling their goods under similar misrepresentation, tending to impose on the public and to prejudice others; and it seems singular that the Court should be asked to dissolve the injunction, which prevents the Defendant from selling or publishing this Catalogue.

It is true, however, that, as the injunction extends to restrain the Defendant from publishing “any work being or

1849.

PRINCE
ALBERT
v.
STRANGE.

—
Judgment.

purporting to be a catalogue of the etchings," it is to be considered whether, under the circumstances, the Defendant has any right so to do. And, in considering this, I shall not regard the fact that the Defendant submits to the injunction against exhibiting, publishing, or parting with the etchings described in the Catalogue, and that the other Defendant, the author and compiler and joint proprietor with the Defendant of the Catalogue, as the Defendant states in his answer, has submitted to the whole of the injunction from part of which the Defendant asks to be released.

Let it be supposed that an injunction were now asked for in the terms of the injunction sought to be dissolved: the case would stand thus:—The affidavits filed before the answer shew that the etchings in question were the works of the Plaintiff, and retained as his private property—not published or intended for publication, some of them only having been given to private friends; that the collection described in the Catalogue could only have been made by impressions surreptitiously and improperly obtained; that the "Catalogue, and the descriptive and other remarks therein contained, could not have been compiled or made except by means of the possession of the several impressions of the said etchings so surreptitiously obtained as aforesaid." By the last affidavit of Mr. *White*, a fact was made known to the Defendant, that, upon one occasion, some of the plates were sent to a Mr. *Brown*, a printer at *Windsor*, for the purpose of having some impressions taken for private use; and that the plates and all the impressions so ordered were returned by Mr. *Brown*.

The answer does not in any manner question, qualify, or vary the case so made; but simply states, that the Defendant did not know or believe that the copies had been improperly obtained; and that *Judge*, who was in the possession

of them, did, as the Defendant believed, purchase them of one *Middleton*; but states nothing as to how *Middleton* obtained them, and states nothing as to *Brown*, so called to his attention by Mr. *White's* affidavit.

1849.
PRINCE
ALBERT
v.
STRANGE.
—
Judgment.

The result is, that the case stated by the affidavit is not met by the answer, and the answer does not set up any title adverse to the case so made. But, in this state of things, the Defendant insists that he is entitled to publish a catalogue of the etchings—that is to say, to publish a description or list of works or compositions of another, made and kept for the private use of that other, the publication of which was never authorised, and the possession of copies of which could only have been obtained by surreptitious and improper means.

It was said, by one of the learned counsel for the Defendant, that the injunction must rest on the ground of property or breach of trust. Both appear to me to exist in this case. The property in an author or composer of any work, whether of literature, art, or science, such work being unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed. I say “assumed,” because, in most of the cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right: as, in the case of letters, how far the sending of the letters; in the case of dramatic composition, how far the permitting performance; and, in the case of *Abernethy's* Lectures, how far the oral delivery of the lecture had deprived the author of any part of his original right and property—a question which could not have arisen if there had not been such original right or property. It would be a waste of time to refer in detail to the cases on this subject.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Judgment.

If, then, such right and property exist in the author of such work, it must so exist exclusively of all other persons. Can any stranger have any right or title to, or interest in, that which belongs exclusively to another? And yet this is precisely what the Defendant claims, although, by a strange inconsistency, he does not dispute the general proposition as to the Plaintiff's right and property; for he contends, that, admitting the Plaintiff's right and property in the etchings in question, and, as incident to it, the right to prevent publication or exhibition of copies of them, yet he insists that some persons, having had access to certain copies, (how obtained I will presently consider), and having from such copies composed a description and list of the originals, he, the Defendant, is entitled to publish such list and description: that is, that he is entitled, against the will of the owner, to make such use of his exclusive property.

It being admitted that the Defendant could not publish a copy—that is, an impression—of the etchings, how in principle does a catalogue, list, or description differ? A copy or impression of the etchings could only be a means of communicating knowledge and information of the original; and does not a list and description do the same? The means are different, but the object and effect are similar; for in both the object and effect is to make known to the public, more or less, the unpublished works and compositions of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others.

Cases of abridgments, translations, extracts, and criticisms of published works, have no reference whatever to the present question. They all depend on the extent and right, under the acts, with respect to copyright, and have no analogy to the exclusive right of the author in unpublished compositions, which depend entirely on the common-

law right of property. A clerk of Sir *John Strange*, having, whilst in his employ, made an abridgment of such of his manuscript cases as related to evidence, was restrained by Lord *Hardwicke*, in 1754, from publishing it, the cases themselves being then unpublished.

1849.
PRINCE
ALBERT
v.
STRANGE.

Judgment.

Upon the first question, therefore, that of property, I am clearly of opinion, that, the exclusive right and interest of the Plaintiff in the compositions and works in question being established, and there being no right or interest whatever in the Defendant, the Plaintiff is entitled to the injunction of this Court to protect him against the invasion of such right and interest by the Defendant, which the publication of any catalogue would undoubtedly be.

But this case by no means depends solely on the question of property; for a breach of trust, confidence, or contract itself would entitle the Plaintiff to the injunction. The Plaintiff's affidavit states the private character of the work or composition, and negatives any license or authority for publication, (the gift of some of the etchings to private friends not implying any such license or authority); and states distinctly the belief of the Plaintiff that the Catalogue, and the descriptive and other remarks therein contained, could not have been compiled, except by means of the possession of the several impressions of the etchings, surreptitiously and improperly obtained. To this case no answer is made, the Defendant saying only, that he did not at the time believe the etchings to have been improperly obtained, but not suggesting any mode by which they could have been properly obtained, so as to entitle the possessor to use them for publication.

If, then, these compositions were kept private, except as to some given to private friends, and some sent to Mr. *Brown*, for the purpose of having certain impressions taken,

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Judgment.

the possession of the Defendant, or of his partner *Judge*, must have originated in a breach of trust, confidence, or contract in *Brown*, or some person in his employ, taking more impressions than were ordered, and retaining the extra number; or in some person to whom copies were given, which is not to be supposed, but which, if it were the origin of the possession of the Defendant, would be equally a breach of trust, confidence, or contract, as was considered in the case of *The Duke of Queensberry v. Shebbeare* (a). And upon the evidence on behalf of the Plaintiff, and the absence of any explanation on the part of the Defendant, I am bound to assume that the possession of the etchings or engravings, on the part of the Defendant or *Judge*, has its foundation in a breach of trust, confidence, or contract, as Lord *Eldon* did in the case of Mr. *Abernethy's* Lectures, as reported in 3 Law Journal, 209; and upon this ground, also, I think the Plaintiff's title to the injunction sought to be discharged fully established.

The observations of Vice-Chancellor *Wigram*, in *Tipping v. Clarke* (b), are applicable to this part of the case. He says, "Every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. If the Defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the Plaintiff; and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract."

In this opinion I fully concur; and I think that this case—the case supposed by Sir *J. Wigram*—has actually arisen,

(a) 2 Eden, 329.

(b) 2 Hare, 393.

or must from the evidence be assumed to have arisen, in the present, and the consequence must be what Sir *J. Wigram* thought would follow. Could it be contended that the clerk, although not justified in communicating copies of the accounts, would yet be permitted to publish the substance and effect of them?

1849.
PRINCE
ALBERT
v.
STRANGE.
Judgment.

In that, as in this case, the matter or thing of which the party had obtained knowledge being the exclusive property of the owner, he has a right to the interposition of this Court to prevent any use being made of it; that is to say, he is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his own.

This was the opinion of Lord *Eldon*, expressed in the case of *Wyatt v. Wilson*, in the year 1820, respecting an engraving of *George III.*, during his illness; in which, according to a note with which I have been furnished by Mr. *Cooper*, he said, “If one of the late King’s physicians had kept a diary of what he had heard and seen, this Court would not, in the King’s lifetime, have permitted him to print or publish it.” The case of *Sir John Strange’s Manuscripts* is also applicable to this point.

Some minor points were raised at the bar, to which I will shortly advert. It was contended, there ought not to be any injunction until the Plaintiff had established his title at law; and cases were referred to, in which it was supposed I had laid down rules establishing such a proposition. The cases referred to are cases in which the equitable jurisdiction arose from some legal title, and was exercised solely for the purpose of protecting the party in the enjoyment of such legal title, and they have no application to cases in which this Court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but to prevent what this Court considers and treats as a wrong,

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Judgment.

whether arising from violation of unquestioned right, or from breach of trust, confidence, or contract, as in the present case, and in the case of Mr. *Abernethy's* Lectures.

But, even in the cases so referred to, I have always held, that it was for the discretion of the Court to consider whether the Defendant might not sustain greater injury from an improper injunction, than the Plaintiff from delay in granting it. In the present case, where the privacy is the right invaded, the postponing of the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend on any legal right; and, to be effectual, it must be immediate.

It was then observed, that the injunction was too extensive, as it applied to any catalogue of the etchings in the bill mentioned, and the Plaintiff had shewn a title to only some of the etchings there mentioned. If the Defendant had any interest in this matter, the objection would deserve consideration; but it is clear he has none, being already under an injunction as to all those etchings, to which the Plaintiff has not shewn a title in this case. So that, while the other injunction continues, he could derive no benefit whatever from any alteration in the terms of this injunction; and, if any such alteration were made, it would not affect the question of costs, that not being the object of this motion, which must, therefore, be refused, with costs.

Statement.

On a motion to dissolve an injunction granted on an original bill, affidavits filed in support of allegations subsequently introduced, by amendment, to strengthen the Plaintiff's case, cannot be read against the Defendant.

The original bill, on which the injunction was granted, alleged, that the impressions had been surreptitiously obtained. The amended bill charged the particular mode in which they had been obtained, namely, by means of copies which had been improperly kept back when the etchings had been sent to *Brown*, for the purpose of having some

impressions taken. By the answer, *Strange* disclaimed all knowledge of the facts so stated; but affidavits were filed, on behalf of the Plaintiff, in corroboration of them. A question was raised, whether these affidavits could be used on a motion to dissolve the injunction which had been granted on the original bill, in which these facts were not introduced.

1849.
PRINCE
ALBERT
v.
STRANGE.
Statement.

Jefferys v. Smith (a), Norway v. Rowe (b), Edwards v. Jones (c), and Hilton v. Lord Granville (d) were cited.

The LORD CHANCELLOR:—

Judgment.

When it is said, that, in such cases as the present, a Plaintiff cannot file additional affidavits to better his title, I understand by the word “title,” not his title to the property, but the title under which he claims the injunction—the right to the injunction. Now, beyond all doubt, these affidavits do affect the right to the injunction; because, whether material or not, the Plaintiff puts them forward as a helping-ground on which he asks for the injunction. I think, on that ground, it would be impossible to maintain the admissibility of the affidavits. But the case is free from doubt, because the rule is, that, if you amend your bill without prejudice to the injunction, you do it for the ultimate purpose of the suit; you leave the question of injunction just where it was before, and you must maintain the injunction on the case originally stated. The cases cited do not apply at all; because those cases establish a very wholesome rule, to deter people from getting injunctions by misrepresenting the facts to the Court. If, however, you get an injunction by misrepresentation or suppressing a fact, which, if communicated to the Court, might

(a) 1 J. & W. 299.

(b) 19 Ves. 148.

(c) 1 Phil. 501.

(d) 4 Beav. 130.

1849.
 PRINCE
 ALBERT
 v.
 STRANGE.
 —
Judgment.

have operated on the mind of the Court, although you may shew you are entitled to the injunction, the Court will not let you uphold that injunction so improperly obtained. But it does not follow from that, that, if a Plaintiff shews he is entitled to an injunction, not communicating a fact which may afterwards appear, and which, if communicated, could not possibly have interfered with the granting of the injunction, but would have strengthened the case in favour of the injunction, you are, therefore, to have the injunction dissolved. That would be carrying the doctrine to a very extraordinary length. But here there is no doubt that this fact, which is introduced by amendment, was introduced for the purpose of aiding the Plaintiff's case, and supporting the injunction obtained on the original bill. I think, therefore, on those grounds, the affidavits cannot be received on a question, whether the original injunction was properly granted.

1824.
Dec. 10th,
18th, 22nd,
& 23rd.

1825.
June 10th &
17th.

A person who attends oral lectures is not justified in publishing them for profit; and an action at law will lie upon the implied contract by the lecturer against a pupil attending oral lectures who causes them to be published for profit.

An injunction will be granted against third persons publishing lectures orally delivered, who have procured the means of publishing those lectures from parties who attended the oral delivery of them, and were bound by the implied contract.

ABERNETHY v. HUTCHINSON (a).

THE bill in this case was filed by Mr. *Abernethy*, a distinguished surgeon, and the lecturer at the theatre of *St. Bartholomew's Hospital* on the principles and practice of surgery, and sought an account of the profits made by the Defendants *Hutchinson, Knight, and Lacey*, from the sale of certain publications containing lectures on surgery delivered by the Plaintiff at the above theatre, and that they

(a) By the kind permission of the proprietors of the *Law Journal*, the Reporters are enabled to insert the following account of

this case, which is stated at greater length in the *Law Journal* for 1825, p. 209.

might be enjoined from printing and publishing any other work or works, publication or publications, being or purporting to be lectures delivered or to be delivered by the Plaintiff, and also from reprinting and republishing the surgical lectures, or any work or works, publication or publications, being or purporting to be delivered by the Plaintiff, or any or either of them.

1824.
 ABERNETHY
 v.
 HUTCHINSON.
 Statement.

Mr. *Abernethy's* affidavit in support of the bill was as follows, viz. :—

“That, on the 4th of October, 1824, the Plaintiff commenced the delivery of a course of lectures on the principles and practice of surgery, at the theatre of *St. Bartholomew's Hospital*, to his pupils and to students and persons desirous of acquiring a knowledge of surgery, and who, previously to the commencement of the intended course, had respectively been admitted by him as attendants upon such course, and had signed their names respectively in a book provided for that purpose, and had paid the fees for the privilege and permission of attending the same; that the said course of lectures was to consist of about thirty lectures, to be delivered by the Plaintiff on Monday and Wednesday evenings in every week; that these lectures were delivered by him, as from writings, the property of the Plaintiff, and composed by him, and which the Plaintiff had not yet printed or published, and that they were his own sentiments and language; that he had not authorised the publication thereof, or given such authority to any of the persons respectively attending the said lectures, or to any person or persons whatsoever; that he intended to print and publish his said course of lectures; that lectures had for a great number of years been delivered by the Plaintiff and by eminent persons his predecessors; and that, from the understanding and usage subsisting for a long space of time between the lecturer and the persons attending the same, no publication of lectures had

1824.
 ABERNETHY
 v.
 HUTCHINSON.
 —
Statement.

ever been made by the persons attending them; that, on the 9th of October, 1824, was published a number or part of a periodical work called 'The Lancet,' in which was described, as in the very words and figures thereof, in the name of the Plaintiff, the lecture which he had so as aforesaid delivered on Monday evening, the 4th of October; that the said work held out to the public, that it then gave, and that from time to time it would continue to give, the Plaintiff's said lecture and lectures with minute fidelity; that this number of 'The Lancet' contained a notice or advertisement that a lecture on the Principles and Practice of Surgery, by the Plaintiff, would be published in every succeeding number of 'The Lancet' until the course should be concluded; that a certain other number of the said work appeared on the 16th of October, 1824, in like manner giving to the public the lecture delivered by the Plaintiff in the previous week; that he delivered his third lecture on the 11th of October; that at that time, the circumstance of the publication of the first and second lecture having been communicated to the Plaintiff, he took occasion to express to the class assembled at the said theatre his disapprobation of the said publication, and to protest against the same; that believing, as the fact was, that his lectures had been taken down in short-hand by some person or persons attending the class, and afterwards published by or with the direction or consent of such person or persons, he called upon such person or persons to avow himself or themselves, and offered to return the money paid for attendance upon the said course, either there or in any manner least offensive to the feelings of such person or persons, but no person or persons did then avow or had since avowed themselves; that on Saturday, the 23rd of October, was published a certain other number of 'The Lancet,' and the same commenced and was headed as follows:— 'Surgical Lecture delivered by Mr. *Abernethy*, Theatre, *Bartholomew's Hospital*.—Lecture 3;' and then proceeded to give *verbatim* the lecture delivered by him as aforesaid;

that other successive numbers of 'The Lancet' had been published, containing articles intitled 'Surgical Lectures delivered by Mr. *Abernethy*, Theatre, *St. Bartholomew's Hospital*;' that the articles respectively professed to be the publications *verbatim* of the Plaintiff's lectures respectively, and were advertised as intended to be from time to time published in regular continuation; that to all the said numbers was annexed a notice stating that they were 'printed and published by *G. L. Hutchinson*, at "The Lancet" office, 201, Strand, London, where all communications to the Editor are requested to be addressed, post-paid;—this work is published at an early hour every Saturday morning;' and to the said numbers of the 6th, 13th, 20th, and 27th of November, and the 4th of December, was also annexed a similar notice, with the addition that they were published 'at an early hour every Saturday morning, and sold by *Knight & Lacey*, Paternoster-row, and sold by all booksellers in the United Kingdom;' that *G. L. Hutchinson*, *John Knight*, and *Henry Lacey* were jointly interested in the profits of the said publication, and had received considerable sums in respect thereof; that the Plaintiff had not given to *G. L. Hutchinson*, *John Knight*, and *Henry Lacey*, or to any or either of them, or to any other person or persons, any authority whatsoever to print or publish the said lectures, either in whole or in part, or to use his name, sentiments, and language, any or either of them, in the manner in which they had already done in the said several numbers or parts of the said 'Lancet,' respectively, and threatened and intended to do in the future numbers or parts thereof; that the Plaintiff alone had the property in the said lectures, and in the sentiments and language thereof; and that the copy or writings from which the same had been and were in future to be delivered was the property of the Plaintiff."

1824.
 ABERNETHY
 v.
 HUTCHINSON.
 —
Statement.

On the other hand, the Defendant *Hutchinson* filed an

1824.
ABERNETHY
v.
HUTCHINSON.
—
Statement.

affidavit, stating that the Plaintiff had been, during the last twenty-five years and upwards, surgeon of *St. Bartholomew's Hospital*, and had, during all that time, delivered lectures on the principles and practice of surgery in the theatre of such hospital, which theatre was set apart by that establishment for the exclusive purpose of delivering lectures there; that the *Royal College of Surgeons*, before they granted a diploma to any person, required certificates of attendance on surgical lectures in certain recognised schools or hospitals; that *St. Bartholomew's Hospital* was one of the hospitals so recognised by the *College of Surgeons*, and that the only certificates of attendance upon distinct lectures delivered in *London* upon the principles and practice of surgery recognised and received by the *College of Surgeons* were the certificates of the hospital surgeons themselves; that the surgeons and lecturers for the time being of such hospital were appointed by the governors of the said hospital; that the predecessors of the Plaintiff, surgeons in such hospital, had been accustomed to deliver lectures in the said theatre, but that such persons had never published the lectures so delivered by them, nor ever insisted upon an exclusive right to or property in the same; that no stipulation or condition had ever been made or imposed by the Plaintiff, or by his predecessors in the office of surgeon or lecturer of such hospital, upon the admission of students to attendance upon such lectures, as to the manner in which the said students should make use of the knowledge or information acquired at the said theatre; that the principles inculcated and delivered by the Plaintiff in such lectures were not new principles originating with him, but were substantially the same principles and practice of surgery as were originally promulgated by the late surgeon, *John Hunter*, and others, as would appear by a comparison of such lectures with the publications and works of the said *John Hunter*; that the lectures delivered by the Plaintiff had been delivered

extemporaneously, and were not read from any papers or other writings at the time of the delivery thereof, and were illustrations of the principles of surgery, as laid down by *John Hunter* and others, for the most part derived by the Plaintiff from cases in the performance of his duty as a surgeon in the said hospital.

1824.
ABERNETHY
v.
HUTCHINSON.
—
Statement.

On the above affidavits, the *Solicitor-General* (a) and Mr. *Rose* moved, on behalf of the Plaintiff, for an injunction, according to the prayer of his bill.

Argument.

Mr. *Horne* and Mr. *Shadwell*, for the Defendants, contended (*inter alia*) that it had never been decided that a man could have any right of property in ideas and language not reduced into writing; such a right might exist, or it might not exist, but it could not be protected by an injunction till its existence was acknowledged at law.

The LORD CHANCELLOR (ELDON) observed that the case could only be viewed in two ways—either as a question of property, or a question of trust; and with respect to the question of trust, a good deal of that must depend not only on the nature of these lectures, and so on, and the rights and obligations abstractedly considered which those persons were under to whom they were delivered; but it must depend also (indeed very materially) on the affidavits that had been actually filed.

Judgment.

The LORD CHANCELLOR delayed proceeding with the motion, but ordered it to stand for the 20th December. “In the meantime,” said his Lordship, “Mr. *Abernethy* may, if he thinks proper, produce his manuscripts; and, on the

(a) Sir *Charles Wetherell*.

1824.
ABERNETHY
v.
HUTCHINSON.
—
Judgment.

other hand, the Defendants will judge for themselves whether they will or not—and I do not require it of them, because I have no right—inform me how they became possessed of the means of publishing this work, with a view that I may consider what can be made of the argument of trust, or of the argument founded on fraud.”

Statement.

Mr. *Abernethy* made an additional affidavit, stating that he had given his lectures, as most lecturers did, orally, and not from a written composition; but that, previously to the delivery of such lectures, he had from time to time committed to writing notes of such his said lectures, which had been increased and transposed until a great mass of writing had been collected, written in as succinct a manner as possible, with a view to exhibit the arrangement he had formed, and the facts which he had collected, together with his opinions relative to certain subjects of surgery; that a considerable portion of such notes had been, by or under the direction of the deponent, extended and put into writing with a view to publication; which writings he was ready to submit to the inspection of any respectable and competent person, as a test of the deponent's accuracy in the statement made to the Court in his former affidavit, and that such writings were in his possession; that at the time of delivering his said lectures he did not read or refer to any writing before him, but that he delivered such lectures orally, and from recollection of such notes and writings; and that the lectures so delivered by him, though not verbatim the same as his notes and writings, yet were in substance, arrangement, and statement of the facts, substantially the same; that such lectures varied from time to time, both in the language and arrangement, according to circumstances, and from any new matter that might have occurred to him by way of illustration or otherwise; that, on a comparison of the written notes or lectures with those so orally delivered by him, they would and must necessarily vary, and in like

manner they would be found to vary from the lectures pirated, or alleged to be pirated, by the Defendants, in the publication called "The Lancet;" that the composition of the said lectures so reduced into writing had cost him much time and study for a long series of years; that his duties as a surgeon to *St. Bartholomew's Hospital* and lecturer were entirely distinct; and that it was no part of his duty, as such surgeon, to deliver lectures, but that the same were in the nature of private lectures, and were not attended by any persons unless by his permission, and were not in any way open or accessible to the public.

1824.
 ABERNETHY
 v.
 HUTCHINSON.
 —
Statement.

The case was again argued: and the LORD CHANCELLOR, after observing, that, as the written notes had not been produced, he must treat the lectures as orally delivered, proceeded as follows:—

Judgment.

In *Millar v. Taylor* (a) there is a great deal said with respect to a person having a property in sentiments and language, though not deposited on paper, but there has been no decision upon that point yet. And as it is a pure question of law, I think it would be going further than a Judge in Equity should go, to say, upon that, that he can grant an injunction upon it, before the point is tried.

There is another ground for an injunction, which is a ground arising out of an *implied contract*. I should be very sorry if I thought that any thing which has fallen from me should be considered to go to the length of this—that persons who attend lectures or sermons, and take notes, are to be at liberty to carry into print those notes for their own profit, or for the profit of *others*. I have very little difficulty upon that point; but that doctrine must apply either to

(a) 4 Burr. 2303.

1824.
 ABERNETHY
 v.
 HUTCHINSON.
 —
Judgment.

contract or breach of trust. Now, with respect to contract, it is quite competent for Mr. *Abernethy*, and for every other lecturer, to protect himself in future against what is complained of here. There is a contract expressed, and a contract implied; and I should be very sorry to have any man understand, that this Court would not act as well upon a contract implied as upon a contract expressed, provided only the circumstances of the case authorise the Court to act upon it. I have not the slightest difficulty in my own mind, that a lecturer may say to those who hear him—“You are entitled to take notes for your own use, and to use them perhaps in every way except for the purpose of printing them for profit; you are not to buy my lectures to sell again; you come here to hear them, for your own use, and for your own use you may take notes.” In the case of Lord *Clarendon’s* work (*a*), the history was lent to a person, and an application was made for an injunction to stay the publication. It was said there, that there was no ground for the injunction; and it was proved, on affidavit, that my Lord *Clarendon’s* son said, “There is the book and make what use you please of it;” the *Chancellor* however of that day said, that he could not mean he was to print it for his profit. So with respect to letters, my Lord *Hardwicke* says, in one case (*b*), that the person who parts with letters still retains a species of property in them, and that the person who receives them has also a species of property in them. He may do what he pleases with the papers; he may make what use he pleases of the letters, except print them. There he puts the jurisdiction upon the ground of property. In other cases we find it put upon the ground of breach of a trust—that the letter is property, part of which I have retained and part I have given to you; you may make what use of the special property you have in it you please; but you shall not make use of my

(*a*) *Duke of Queensberry v. Shebbeare*, 2 Eden, 329.

(*b*) *Pope v. Curl*, 2 Atk. 342.

interest in it; therefore you shall not print it for profit. Now, if there is an express contract—for instance, if Mr. *Abernethy* says, “Gentlemen, all of you who attend and pay five guineas for attending my lectures, may take notes of what I say, but let it be understood that you shall not print for profit;” then in that case I should not have the least difficulty in saying, if any student afterwards did think proper to publish for profit, that there is hardly a term which this Court would think too harsh for him; and it would restrain him.

1824.
 ABERNETHY
 v.
 HUTCHINSON.
 —
Judgment.

There is another ground, which is, whether, looking at the general nature of the subject, it is not very difficult to say, that there is not a contract which would call upon the Court to restrain the parties who hear the lectures from publishing the notes they may have taken—they may make whatever use of them they please, but they ought not to publish them. If an express contract exists, or if any contract is to be implied, either contract would be the ground of an action for a breach of contract.

With respect to trust, the question here would be, whether there is not an implied trust with respect to the student himself? One thing is quite clear, that if those lectures have been published from short-hand writer’s notes, they have been published from short-hand writer’s notes taken by some student, or from short-hand writer’s notes taken by some intruder into the lecture room; for I do not see how it is possible that they could have been taken otherwise. If there is either an implied contract on the part of the student or a trust, and if you can make out that the student has published, I should not hesitate to grant the injunction. With respect to the stranger, if this Court is not to be told (and certainly it has no right to compel the parties to tell) whether the power of giving the oral lectures to the public was derived from a student or

1824.

ABERNETHY
v.
HUTCHINSON.

Judgment.

not, I think it very difficult to tell me that that should not be restrained which is stolen, if you would restrain that which is a breach of contract or of trust.

Upon the whole, taking this case as it now stands as a case simply of oral lectures, it must be tried whether it is legal to publish them or not. Upon the question of property in *language and sentiments* not put into writing, I give no opinion, but only say that it is a question of mighty importance. At present, therefore, I must refuse the injunction; but I give leave to make this very motion on the ground of breach of contract or of trust.

1825.

Statement.

Afterward, the bill was amended by the introduction of allegations, that no persons had a right to attend the lectures, except those who were admitted to that privilege by the lecturer; that it had always been understood by him, and those who preceded him in the office, and those who attended the lectures, that the persons who so attended did not acquire, and were not to acquire, any right of publishing the lectures which they had heard; but that the Plaintiff and his predecessors, respectively, had and retained the sole and exclusive right of printing and publishing their respective lectures, for his and their own respective benefit; that there was an implied contract between the Plaintiff and those who attended his lectures, that none of them should publish his lectures, or any part thereof: that the Defendants had been furnished with the copy of the lectures which they had printed, through the medium of some person who had attended the lectures under Mr. *Abernethy's* above-mentioned permission; and that it was a breach of contract or trust in such person so to furnish the copy, and in the Defendants to print and publish the same.

These allegations being verified by the affidavit of the Plaintiff—

The *Solicitor-General* renewed his motion before his Lordship for an injunction, and contended that there was an implied contract between the lecturer and his pupil; that the latter bought of the former simply a right to hear, and probably to write down his lectures, but not to publish them; that the pupil did not purchase the lecturer's science, that he might sell it again; and that there could not be two copyrights.

Mr. *Abercromby*, Mr. *Rose*, and Mr. *Duckworth* were on the same side.

Mr. *Horne*, Mr. *Shadwell*, and Mr. *Brougham* opposed the motion.

1825.
ABERNETHY
v.
HUTCHINSON.
—
Argument.

On June 17th the LORD CHANCELLOR stated, that, where the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same principle upon which literary composition was protected; because the Court must be satisfied that the publication complained of was an invasion of the written work; and this could only be done by comparing the composition with the piracy. But it did not follow, that, because the information communicated by the lecturer was not committed to writing, but orally delivered, it was, therefore, within the power of the person who heard it to publish it. On the contrary, he was clearly of opinion, that whatever else might be done with it, the lecture could not be published for profit. He had the satisfaction now of knowing, and he did not possess that knowledge when this question was last considered, that this doctrine was not a novel one; and that this opinion was confirmed by that of some of the Judges of the land. He

Judgment.

1825.
ABERNETHY
v.
HUTCHINSON.
—
Judgment.

was, therefore, clearly of opinion, that, when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling. There was no evidence before the Court of the manner in which the Defendants got possession of the lectures; but as they must have been taken from a pupil, or otherwise in such a way as the Court would not permit, the injunction ought to go upon the ground of property; and although there was not sufficient to establish an implied contract as between the Plaintiff and the Defendants, yet it must be decided, that, as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit, there was sufficient to authorise the Court to say, the Defendants shall not publish. He had no doubt whatever that an action would lie against a pupil who published these lectures. How the gentlemen who had published them came by them, he did not know; but whether an action could be maintained against them or not, on the footing of implied contract, an injunction undoubtedly might be granted; because, if there had been a breach of contract on the part of the pupil who heard these lectures, and if the pupil could not publish for profit, to do so would certainly be what this Court would call a fraud in a third party. If these lectures had not been taken from a pupil, at least the Defendants had obtained the means of publishing them, and had become acquainted with the matter of the lectures, in such a manner that this Court would not allow of a publication. It by no means followed, because an action could not be maintained, that an injunction ought not to be granted. One question had been, whether Mr. *Abernethy*, from the peculiar situation which he filled in the hospital, was precluded from pub-

lishing his own lectures for his profit; but there was no evidence before the Court that he had not such right. Therefore, the Defendants must be enjoined in future.

1825.
ABERNETHY
v.
HUTCHINSON.
Judgment.

The only question remaining was, whether the delay which had taken place in renewing the application was a ground for saying that the injunction ought not to go to restrain the sale of such of the lectures as had been printed in the interim. His Lordship's opinion was, that the injunction ought to go to that extent, and to include the lectures already published.

M'INTOSH v. THE GREAT WESTERN RAILWAY COMPANY.

1849.
Feb. 9th.

A MOTION had been made before the Vice-Chancellor *Knight Bruce*, for the production of documents admitted by the Defendants' answer to be in their possession. The Vice-Chancellor ordered the production of some of them; but, as to other documents, he directed the motion to stand over.

The motion was now renewed, by way of appeal, before the Lord Chancellor, for the purpose of obtaining the production of all the documents.

The Defendants, the Great Western Railway Company, and their engineer, Mr. *Brunel*, and their secretary, Mr. *Saunders*, had put in a joint answer, which began by stating, as follows:—

they were, therefore, not bound to produce them:—*Held*, that, after the offer of production in the beginning of the answer, the Plaintiff was entitled to the production of all the documents mentioned in the schedule.

Defendants stated, in the beginning of their answer, that they could not answer further than as appeared therein, and in the various documents which were set forth in the schedule, and which they offered to produce. In the latter part of the answer they admitted the possession of various documents, but insisted that some of them were privileged communications, and that

1849.
—
M'INTOSH
v.
THE GREAT
WESTERN
RAILWAY CO.
—
Statement.

“ By reason of the lapse of time, the magnitude and variety of the transactions and matters in the said bill mentioned and inquired after, the deaths of some, and absence of other parties, and other circumstances, these Defendants are unable now to speak with certainty as to many of the matters in the said bill mentioned and inquired after. But the Defendants, *Isambard Kingdom Brunel* and *Charles Alexander Saunders*, respectively, say, that, in this their answer, they have respectively spoken to the best of their knowledge, remembrance, information, and belief. And all the Defendants say, that, save as herein and in and by the certificates, reports, correspondence, books, documents, papers, and writings *which* are mentioned and comprised in the schedule hereunto annexed, *and which* the Defendants are willing to produce as part of their answer, in the same manner as if the same had been set forth at length, is mentioned, and appears, the Defendants respectively are unable to make any further or better answer to all or any of the matters and things in the said bill mentioned and inquired after, and which, as the Defendants are advised, it is necessary for them, or any or either of them, to make answer unto.”

In the latter part of the answer they stated as follows: —“ The Defendants, the said Company, have in their possession or power the several documents, papers, and writings mentioned and set forth in the schedule hereunto annexed, and which relate, as to some of them, wholly, and as to the rest in part, to the matters and things in the said bill mentioned, and which the Defendants, the said Company, are ready and willing to produce (except as hereinafter mentioned):

“ That all correspondence, or copies of any correspondence, or other communications, or copies of communications in writing passing between the Defendants or their respective

secretaries, clerks, or agents, or any or either of them, on the one hand, and their respective solicitors or clerks of their solicitors, or any or either of them, on the other hand, are privileged communications, and that the Defendants ought not to be compelled to produce the same."

1849.
M'INTOSH
v.
THE GREAT
WESTERN
RAILWAY Co.
—
Statement.

The documents referred to in the latter clause of the answer formed the class of documents as to which the Vice-Chancellor *Knight Bruce* had directed the motion to stand over. There was no question but that the documents would be privileged, if the former part of the answer did not amount to an offer to produce them, from which the Defendants could not recede.

Mr. *J. Russell* and Mr. *Bazalgette*, for the motion, relied on *Hardman v. Ellames* (a), where the documents related to the Defendant's title, and not to the Plaintiff's; but it was held, that they were so incorporated with the answer, that the Defendant was bound to produce them. They also cited *White v. Williams* (b), where the Defendants had given very little information by their answer, but referred to documents, as they had done in this case; and where they contended, that exceptions to their answer for insufficiency must be overruled, because the Plaintiff was clearly entitled to an inspection of all the documents which were referred to, and would thus get all the information he required.

Argument.

Mr. *Bacon* and Mr. *Stevens*, contra, contended, that the first part of the answer referred to documents which must answer the two descriptions there given of them:—First, they must be documents which were mentioned in the schedule; and, secondly, they must be such as the Defendants were willing to produce. Then the documents

(a) 2 My. & K. 732.

(b) 8 Ves. 193.

1849.
 M'INTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY Co.
 —
Argument.

which they were willing to produce must be ascertained by looking to the latter part of the answer, where protection was claimed for some of the documents which were in the schedule. The whole answer must be taken together; and then the privileged communications were not so incorporated with the answer as to render it necessary for the Defendants to produce them.

Judgment. The LORD CHANCELLOR, (without hearing a reply):—

The first question is, as to the construction of the sentence; and on that it is impossible to entertain any doubt. The Defendants having to make a certain discovery do not deal with each question; but they endeavour to protect themselves by setting out in the schedule a long enumeration of various documents, and they say they can give no further discovery than such as appears in the answer and in the documents which are comprised in the schedule. That clearly means *all* which are comprised in the schedule. Then come the words, "*and which* they are willing to produce." The second "*which*" must refer to the same things as the first "*which*;" and the result is, that there is an offer to produce all the documents which are set out in the schedule.

Then the question is, whether that does not make the documents part of the answer within the meaning of the decision in *Hardman v. Ellames* (a). I understand that case is not reported at the Rolls, but I have a distinct recollection of it; and, according to my recollection, I went upon this ground:—I said, as this party has referred to the document and partly set it out, he cannot afterwards tell the Plaintiff he shall not see it. He is not bound to take the Defendant's construction of the document. If the Defendant uses

(a) 2 Myl. & K. 732.

it at all, the Plaintiff is entitled to know that it was stated properly. If the Defendant had set out any one of the documents, and said, "that, except as therein mentioned, he did not know," the Plaintiff would clearly be entitled to see the document. The Defendants here have said so with regard to all these documents. If the statement in the answer did not mean that, it meant nothing; because, if a Defendant sets out the document, and then says, "I know nothing further, but I will not produce it," it is virtually saying, "I will not give you any information at all." He adopts his own plan; and he cannot now escape from it. I find in the body of this answer, a statement of the Defendants that they cannot answer, except by reference to the documents, which they refer to as part of the answer, and offer to produce. They have themselves elected the mode of giving the Plaintiff the information to which he is entitled. It cannot possibly be distinguished from *Hardman v. Ellames*. In both cases, circumstances existed, in which, if it had not been for the general reference making the documents part of the answer, the parties would have been exempted from producing the documents. A Defendant cannot say, "In one part of my answer I told you something, which I was not bound to tell, out of a privileged communication. I will now claim that privilege; I will not let you know whether what I said was true or not." That case of *Hardman v. Ellames* came before me first at the Rolls; it came afterward to this Court, and the order which I made was affirmed; and that decision is perfectly undistinguishable from the present. The Vice-Chancellor's order was against the applicant, although it was not a direct refusal to give him the production. But an order, that a motion shall stand over, may be of the same effect as a refusal. The Plaintiff is entitled to see the documents, and, therefore, has a right to complain of his Honor's order. I do not act contrary to the opinion of the Vice-Chancellor; but I decide that point, on which he gave no directions.

1849.
 M'INTOSH
 v.
 THE GREAT
 WESTERN
 RAILWAY Co.
 —
Judgment.

1849.

1848.

Dec. 18th,
19th, & 20th.

1849.

Jan. 30th.

A charity was founded some time in the 12th century, and was commonly called "The Master, Brethren, and Sisters of the Hospital of *St. John the Baptist*." In the time of *Charles II*, the mastership of the hospital and the lands &c. belonging to it were granted to the corporation of *Chester*. The leases of the hospital lands had never been granted by the corporation under their common seal; but, in the leases, the corporation were described as being the Master of the Hospital, and the rents were reserved to the Master, Brethren, and Sisters. An information was filed against the corporation of

Chester and the parties who had been appointed trustees of the charity estates under the Municipal Corporations Reform Act, to ascertain the charity lands, and to have a scheme for the due regulation of the charity; to which information the Master, Brethren, and Sisters of the Hospital were not made parties as a corporate body. It was decided by the Court, that they did not form a corporate body; and, consequently, an objection, that they ought to have been made parties to the information, as a corporation, was not sustained.

The objection, that the hospital ought to have been a party to the information as a corporate body, was not taken by the corporation of *Chester* until several years after the decree had been made. Whether such an objection, if valid, would be allowed to be taken by such a party after such a lapse of time, *quære?*

THE ATTORNEY-GENERAL v. THE CORPORATION OF CHESTER.

THIS case came before the *Lord Chancellor* on appeal from a decision of the *Master of the Rolls*, and upon a petition.

The decree which was appealed from was made in March, 1842, in an information against the Mayor, Aldermen, and Burgesses of the city of *Chester*, and the persons who had been appointed under the Municipal Corporations Reform Act to be trustees of the charity estates which had formerly been vested in that Corporation. The appellants were the Corporation of *Chester*. The petition was presented in the matter of several charities, and in the acts 52 Geo. III., c. 101, and 5 & 6 Will. IV., c. 76. The petitioners were the late Mayor of *Chester*, one of the aldermen, and the Master, Brethren, and Sisters of the Hospital of *St. John the Baptist*, without the North Gate of the city of *Chester*.

It appeared from the statements in the information and the petition, that the precise time of the foundation of that hospital was not known; but it was founded before the commencement of the thirteenth century. The earliest document referred to was not stated in the information, but was mentioned in the petition; it consisted of an *inspeximus* charter of the 11th of King *Edward I*. in 1282, by which i

appeared that *Randulph*, Duke of *Brettany* and Earl of *Chester* and *Richmond*, who used those titles between 1187 and 1200, gave and granted to *God* and *Saint Mary* and *All Saints* the hospital house and all the place in which it was founded, for the receiving of poor persons in pure and perpetual alms for the souls of his father and of all his ancestors; and he took the hospital house under his own hand, and unto his protection as in pure and free charity.

1849.
ATT.-GEN.
v.
THE CORPO-
RATION OF
CHESTER.
—
Statement.

From another inspeximus charter of the 9th of *Edward* II., it appeared that *Edward* Earl of *Chester* (afterwards *Edward* III), for the safety of the souls of his father, himself, and their progenitors, to the increase of divine worship and the support of the monks of *Birkenhead*, granted to the prior and convent of *Birkenhead* the keepership of the hospital, they maintaining the usual charities connected with it.

By a writ issued in the 15th of *Edward* III., directed to the Justice of *Chester* and the Chamberlain, after reciting that the charity had not been duly maintained, they were commanded to take seisin of the hospital and the lands belonging to it on behalf of the Crown; and an inquisition was thereby directed to be held, and a report made, of what the charity lands consisted, and of the nature of the charity.

By an inquisition held under that writ, it was found that the lands of the hospital produced 32*l.* 4*s.* 10*d.* yearly; and that, in the hospital, there were usually three chaplains, and that one lamp was supported for light in the chapel, and that thirteen beds were provided for thirteen poor and weak men of the city, with an appointed quantity of food for them. During the reign of *Richard* II., a grant of the mastership was made to a person for his life; and from that time up to the time of *Oliver Cromwell* the mastership ap-

1849.
 ———
 ATT.-GEN.
 v.
 THE CORPO-
 RATION OF
 CHESTER.
 ———
Statement.

peared to have been granted from time to time to some particular individual.

In 1658, the Corporation of *Chester* obtained a grant from *Oliver Cromwell*; by which, after reciting that the hospital had fallen into decay, and that the most effectual way to have the charity employed properly would be to place the patronage and care of it in the corporation, the Protector granted to the corporation the free gift and donation of the mastership of the hospital, and that they should have the disposition thereof; and that the mayor of the city should be master or warden of the hospital during his mayoralty, and should, during that time, have the oversight of the hospital and the poor thereof, and the receipt and management of its revenues; to hold the office with all the rights, lands, &c., for the sustentation and maintenance of the impotent and aged poor, and for re-edifying the hospital for the use of the master or warden and poor, and defraying all necessary charges, according to the institutions of the founder; and the master was to account to the corporation of *Chester*; and they were to nominate the poor who were to succeed upon any vacancy in the charity.

After the Restoration, King *Charles II.* granted the mastership of the hospital, with all its rights, lands, &c. to Colonel *Roger Whitley*, for his life. And in the thirty-seventh year of his reign, by a grant, which formed a portion of the general charter of the city, the King granted to the mayor and citizens, and their successors for ever, the office of master or warden of the said hospital of *St. John the Baptist*, together with all and singular its rights, members, profits, commodities, advantages, lands, tenements, glebe-lands, tithes, houses, buildings, orchards, gardens, and all other premises with their appurtenances whatsoever, immediately after the death, surrender, or forfeiture of the said *Roger Whitley*, then master or warden of the said hos-

pital, or by whatsoever other mode such office might happen to become vacant, in as ample a manner as the then master or any preceding master held the same.

Colonel *Roger Whitley* died in July, 1697; but, in consequence of some dispute between the corporation and the family of Colonel *Whitley*, the corporation did not obtain possession of the hospital property till 1702, since which year they had been in possession or in receipt of the rents and profits of it.

It was insisted, that the hospital had at all times been, and now was, a body corporate, having a common seal, and was seised of or entitled to divers lands, tenements, and hereditaments, and that the master was the head thereof; and that although the original charter of incorporation was not forthcoming, yet it appeared, that, from a very remote period, the leases of the lands of the hospital had at all times been granted by the corporation of the said hospital, under their common seal, by the style or description of the Master, Brethren, and Sisters of the Hospital of *St. John the Baptist*. That the corporation of *Chester* had not in any instance granted, under its common seal, any lease of any lands belonging to the hospital; nor had they affected to deal with any property of the hospital, except in the character of master of the hospital, in which character, however, the corporation had assumed the right of appropriating and applying to corporate purposes the surplus income of the hospital estates, which had from time to time remained, after keeping in repair the buildings of the hospital, and paying a stipend to the chaplain and certain allowances to the inmates.

An order had been made by the Lord Chancellor on the 29th of August, 1836, that it should be referred to the Master to appoint proper persons to be trustees of and for

1849.
ATT.-GEN.
v.
THE CORPORATION OF
CHESTER.
—
Statement.

1849.
 ATT.-GEN.
 v.
 THE CORPO-
 RATION OF
 CHESTER.
 —
 Statement.

the charity estates and property late vested in or under the administration of the corporation of *Chester*, or any of the members thereof in that character, which were affected by the 71st section of the 5 & 6 Will. IV, c. 76, (the Municipal Corporations Reform Act); and, in pursuance of that order, the trustees, who were Defendants to the information, had been appointed. The report of the Master to this effect was confirmed by an order of the Lord Chancellor made on the 4th of March, 1837.

In 1838 the information was filed to ascertain which were the estates forming the hospital property. It came on to be heard before the Master of the Rolls in 1842, when his Lordship declared that all the lands granted to the Defendants, the mayor, aldermen, and burgesses of the city of *Chester*, as the possessions of the hospital in question in that cause, were subject to the trusts of the charity in the pleadings mentioned, without prejudice to the question, whether the said mayor, aldermen, and burgesses, in respect of the grant of the office of master, were entitled to any portion of the rents and profits thereof. And a reference was ordered to the Master, to inquire what the property belonging to the charity consisted of, and to approve a scheme.

The master, brethren, and sisters of the hospital were not treated as a distinct corporate body, and were consequently not parties to that suit as a corporation.

The petitioners contended, that the orders of the 29th of August, 1836, and the 4th of March, 1837, were erroneous, so far as regarded the estates of the hospital; and that the corporation of *Chester* were never trustees of the said estates within the intent and meaning of the 5 & 6 Will. IV; and that, in fact, the said estates were vested in the master, brethren, and sisters of the hospital in their corporate character.

The appeal was presented by the corporation, and prayed for a rehearing. The other petition prayed that the orders of August, 1836, and March, 1837, might be discharged, altered, or varied, so far as the same related to the hereditaments belonging to the hospital of *St. John the Baptist*.

1849.
ATT.-GEN.
v.
THE CORPO-
RATION OF
CHESTER.
—
Statement.

There was an entry in the assembly-book of the corporation of *Chester*, dated the 10th of December, 1703, of a resolution, that *Daniel Cross* have authority, “under the seal of the hospital of *St. John the Baptist*,” for collecting the revenues thereof.

The income of the charity had increased to about 600*l.* a year, in addition to fines and other advantages; but the amount applied to the charity was only about 85*l.* a year.

In the older leases, the grantors were described sometimes as “The Mayor, Master of the Hospital of *St. John the Baptist*, and the Brethren and Sisters of the Hospital,” and sometimes as “The Mayor of the City of *Chester* and the Citizens of the same City, Master of the Hospital of *St. John the Baptist*, and the Brethren and Sisters of the same Hospital.”

The rents were made payable to the master, brethren, and sisters, and the covenants were entered into with them by the same description. There was a seal belonging to the hospital, which was used by the master; but it did not describe the charity as a corporate body.

Mr. *J. Parker*, Mr. *Rolt*, and Mr. *T. H. Hall*, appeared in support of the appeal and the petition; and

Argument.

The *Solicitor-General*, Mr. *Twiss*, Mr. *Teed*, and Mr. *Bhnt*, contra.

1849.
 ATT.-GEN.
 v.
 THE CORPO-
 RATION OF
 CHESTER.
 —
Argument.

It was contended, on the one side, that the proceedings which had heretofore taken place with regard to this charity, had been taken upon the supposition that the master, brethren, and sisters of the hospital were not a corporation, and that their estates were vested in the corporation of *Chester*. But if the hospital was a corporate body, not only was the information defective, in not having made them parties to the record, but the orders which had been made for the appointment of new trustees were incorrect also. The hospital estates had then been vested in them as a corporate body, of which the corporation of *Chester* formed a part only.

On the other side it was insisted, that it was essential to the existence of a corporation, that it should have the means of keeping up its component parts ; but that the brethren and sisters were not elected either by the hospital or by any of the other members of it, but by the city of *Chester* ; that no charter of incorporation could be produced in support of the claim of the hospital to be a corporate body ; and that there was no reason to believe that any such charter had ever existed.

Another point was also raised as to the construction of the Municipal Corporations Reform Act—whether the Court had jurisdiction to appoint trustees of charity estates, which, prior to that act, had been vested in a still-existing corporate body, of which the municipal corporation formed a part only.

Jan. 30th.
 —
Judgment.

The LORD CHANCELLOR:—

By the decree it is declared, that all the lands granted to the corporation of *Chester*, the possessions of the hospital in question, are subject to the trusts of the charity in the pleadings mentioned, but without prejudice to the ques-

tion, whether the corporation, in respect of the grant of the office of master, is entitled to any portion of the rents and profits thereof; and the Master was directed to approve of a scheme for the due administration of the charity, and the future application of the rents and profits of the charity estate belonging thereto. The decree was pronounced in March, 1842; and, for more than six years, the corporation of *Chester* made no objection to any part of it. It is, indeed, not easy to discover how they can be prejudiced by it.

1849.
 ATT.-GEN.
 v.
 THE CORPO-
 RATION OF
 CHESTER.
 —
Judgment.

Questions have often arisen as to whether grants were altogether devoted to charity, or were intended for the benefit of the donee, subject to certain charity trusts. No such question arises in this case. During the argument, I put the question to the counsel for the corporation, and the answer I received was, that they did not claim against the charity, but under it, and as an object of it. This claim, whatever grounds there may be for it, was expressly reserved by the decree, and the corporation had full liberty to insist upon it before the Master. So far, therefore, as the corporation may have any pecuniary interest in the property, they cannot be prejudiced by the decree, and have no complaint to make against it; and, in fact, on this petition of appeal, they have not made any—the complaint in the petition of appeal being only, that the hospital in question in the cause is a body corporate, subsisting under the name of “The Master, Brethren, and Sisters of the Hospital of *St. John the Baptist* ;” and that the master, brethren, and sisters, in their corporate character, ought to be parties to the suit.

If such a corporation had been proved to exist, and it appeared that it ought to be a party to the cause, though its absence could not lead to any inconvenience or danger to the appealing Defendants, it would have been necessary to decide whether the Court would listen to such an objec-

1849.
 ATT.-GEN.
 v.
 THE CORPO-
 RATION OF
 CHESTER.
 —
Judgment.

tion, raised by such Defendants, after the lapse of so long a time from the decree. But I am relieved from the necessity of deciding that question, being of opinion, that it is proved that the property in question was, prior to the Municipal Corporations Reform Act, vested in the corporation of *Chester*, and that there is no sufficient proof of the existence of any such corporation as that which is alleged.

[His Lordship stated the different charters and grants which have been already mentioned.]

In considering these documents, it must be borne in mind that the proposition of the appealing Defendants is, that, during the whole time embraced by them, there was a corporation of the master, brethren, and sisters of the hospital, in which the lands belonging to the hospital were vested. But, from the foundation to the last grant to the corporation of *Chester*, there is not in these documents any mention of or allusion to any such alleged corporation of the hospital. So far from the lands having been vested in any such corporation, they appear to have been granted with the *custodia* of the hospital, sometimes as part of it, and at other times in terms expressed; in one instance resumed by the Crown, with the resumption of the *custodia* and a re-grant. If such be the true history of the title of the lands, it is not material whether there be or be not such a corporation of the hospital, because in that case it would be clear, that the grant to the corporation of *Chester* included the lands belonging to the hospital; and this case would fall within the operation of the Municipal Corporations Reform Act.

I will, however, briefly examine the evidence on which the fact of there being such a corporation is said to be established; and this turns entirely on certain leases granted from time to time of the hospital lands. In pursuing an

inquiry as to the existence of a corporation from the exercise of corporate acts, it is obvious, that, if such acts be equivocal, they will not prove the existence of a corporation: and if they be more referrible to the natural than to the corporate character, they will disprove it. We must bear in mind that the question is, whether the hospital of *St. John the Baptist* (for that is the name by which it is described in the grants) was a corporation, and the lands vested in them as such. We do not find in any leases any mention of the hospital as a corporation. Had there been any such corporation, the leases would have been by the corporation in its corporate name, and sealed with the corporate seal. Instead of which they are in the private name of the master for the time being, and sealed with his own private seal, although the brethren and sisters, “*with one free assent and consent,*” appear to have been joined with him as granting parties; and the reservation is to the master, brethren, and sisters, and to their successors: and there appears to be appended to some of them a seal, described as the common seal of the master by name, and the brethren and sisters of the hospital, without any allusion to a corporation or a corporate seal. These leases appear to me not only not to establish but to disprove the existence of a corporation. They are quite consistent with what is proved to me by the charters and grants I before observed upon, that the lands were included in the several grants by the Crown with the *custodia* of the hospital, and finally became vested in the corporation of *Chester* by the charter of *Charles II*, and therefore became divested by the Municipal Corporations Reform Act—a proposition admitted by the corporation in 1836, when the new trustees were appointed under that act of Parliament.

I abstain from making any further observations upon the declaration in the decree, that all the lands are subject to the trusts of the charity, although it was rather largely

1849.
 ATT.-GEN.
 v.
 THE CORPORATION OF
 CHESTER.
 —
Judgment.

1849.
 ATT.-GEN.
 v.
 THE CORPORATION OF
 CHESTER.
 —
Judgment.

discussed: because the Appellants do not now dispute that the corporation, claiming under and as objects of the charity, and not against it, have the right reserved to them of endeavouring to establish such a case before the Master, and of which reserved right the Respondents have not complained. The case made by the Appellants on this appeal has, I think, wholly failed, and the petition of appeal must therefore be dismissed with costs; and the other petition must be dismissed with costs also.

*Feb. 8th, 9th,
 & 10th.*

WILLEY v. THE SOUTH-EASTERN RAILWAY COMPANY.

The fact that a Railway Company has had ample time for settling with the owner of land as to the amount of his compensation, but has neglected to do so, will not preclude them from taking possession, under the 85th section of the Lands Clauses Consolidation Act, upon complying with the directions of that section; and if the Company take

possession, when, in consequence of some false step, they were not entitled to do so, that section does not become inoperative, but they are at liberty to correct their error, and their possession will then be authorised.

A bond to secure the payment of the compensation-money to, or the deposit of it in the Bank for, A. B., his executors, &c., but not referring to "the parties interested in the premises," is sufficient to satisfy the terms of the 85th section, where the Company think proper to treat with the claimant as the party really entitled to the land.

THE Plaintiff was the lessee of a house and grounds at *Blackheath*, for the residue of a term of twenty-one years, commencing at Christmas, 1842. A strip of land, which formed part of his kitchen garden, was required by the South-Eastern Railway Company for the railway to *Gravesend*, which was to be formed there by means of a deep cutting. In December, 1846, the Plaintiff received the usual notice from the Company of their intention to take that piece of land, and it was described in the notice as the land numbered 18 in the plan deposited with the clerk of the peace, and a plan of the ground was annexed to the notice, in which plan it was distinguished by a red colour, and was stated to comprise 1R. 8P. The Plaintiff sent in a claim to the Company, demanding 2350*l.* for purchase and compen-

sation money, but stated that he would accept 1500*l.*, if the Company would build a bridge over the railway, so as to connect the severed parts of the kitchen garden.

No further communication passed between the Company and the Plaintiff upon the subject till July, 1848, when, after some prior correspondence, the Company offered to the Plaintiff 463*l.*, and undertook to build a bridge to connect the two parts of the garden. That offer was declined.

The Company shortly afterward, under the provisions of the Lands Clauses Consolidation Act, procured Mr. *Moss*, a surveyor, to be nominated by one of the Metropolitan Police Magistrates for *Woolwich*, to determine the amount which ought to be paid to the Plaintiff. Mr. *Moss* made a valuation, dated the 2nd of September, 1848, and valued the Plaintiff's interest at 740*l.*, and directed that the Company should construct a barrow bridge to connect the severed portions of the land. The sum of 740*l.* was paid into the *Bank of England* by the Company; and a bond for 740*l.* was executed by the Company and two sureties, dated the 13th of November, 1848, and conditioned for the payment to the Plaintiff, or for the deposit in the Bank, of all such purchase-money or compensation as might be determined to be payable in respect of the interest of *Willey*, together with interest from the time at which the Company entered upon the land.

The Company soon afterward took possession, and staked out the part they required. The Plaintiff insisted that these proceedings on the part of the Company were defective, because the surveyor had been appointed by one Magistrate only (*a*); and because the surveyor having directed

1849.
WILLEY
v.
THE SOUTH-
EASTERN
RAILWAY Co.
Statement.

(*a*) By the 2 & 3 Vict. c. 71, s. 14, any one of the Magistrates of the Metropolitan Police Courts was authorised to do all such acts as

were by any law, not containing an express enactment to the contrary, directed to be done by more than one Justice.

1849.
 WILLEY
 v.
 THE SOUTH-
 EASTERN
 RAILWAY CO.

Statement.

the Company to make a bridge for the Plaintiff, it was impossible for them to comply with the 85th section, which directed, that whatever compensation the surveyor awarded, should be paid into court.

This bill was filed on the 20th of December, 1848, to obtain an injunction; and on the 31st of January, 1849, an injunction was obtained by the Plaintiff from the Vice-Chancellor of *England*, to restrain the Company from entering upon or interfering with any part of the lands comprised in the Plaintiff's lease, and from excavating or otherwise dealing with the same, and from erecting or making on any part of the lands any works for the purposes of the railway, until the Defendants had complied with the provisions of the Lands Clauses Consolidation Act.

The Company, after taking some further steps, which it is not necessary to mention, paid the whole amount of Mr. *Willey's* claim, namely, 2350*l.*, into the *Bank of England*, in the name of the Accountant-General of the Court of Chancery, to the account of Mr. *Willey*. They then delivered to him a bond from themselves and two sureties, in the sum of 2350*l.* It bore date the 2nd of February, 1849; and, after reciting that the Company required a piece of land situate at *Charlton*, containing 1*r.* 8*p.*, being part of the piece of land referred to in the plan deposited with the clerk of the peace, being number 18, in which the Plaintiff was or claimed to be interested, and that 2350*l.* was the amount of purchase-money or compensation claimed by the Plaintiff for his interest in the said land, and that the Company had deposited that sum in the *Bank of England*, to the account of the Plaintiff; the condition of the bond was for the payment by the Company, or their sureties, to "the said *Richard Willey*, his executors, administrators, or assigns, or for the deposit in the *Bank of England*, for his or their benefit, as the case might require, under the provisions of

the Lands Clauses Consolidation Act, all such purchase-money or compensation as might, in manner by the same act provided, be determined to be payable by the Company in respect of the interest of the said *Richard Willey* in the said hereditaments and premises, together with interest thereon at the rate of five per cent. per annum, from the time of entering upon the said hereditaments and premises by the Company, until such purchase-money or compensation should be paid or deposited."

1849.
 WILLEY
 v.
 THE SOUTH-
 EASTERN
 RAILWAY CO.
 —
Statement.

On the following day, the Vice-Chancellor ordered the injunction to be dissolved.

A motion was now made to the Lord Chancellor, by way of appeal, for the purpose of reviving the injunction. The principal question was, whether the last bond which the Company had given to the Plaintiff satisfied the 85th section of the Lands Clauses Consolidation Act, 1845, which is stated at length in the judgment of the Lord Chancellor.

Mr. *Rolt* and Mr. *Bagshawe*, in support of the motion.

Argument.

The 85th section was inserted for the benefit of Railway Companies, with a view to assist them in cases where they required possession of land before they had had an opportunity of settling with the owner; but it was not intended to include cases where a Company has had more than two years to come to some arrangement with the owner. The 86th and 89th sections bear out that construction; and the present case can scarcely be held to be within the 85th section, unless that section is decided to apply to all cases, whatever may have been the default and negligence of the Company.

But, even if the case is within that section, this bond is

1849.
 WILLEY
 v.
 THE SOUTH-
 EASTERN
 RAILWAY CO.
 —
Argument.

open to several objections. The Company may first give a bond, and then take possession; but here they first take possession, and they cannot then say, that they will set the matter right by giving a bond. Again, the identity of the land, of which the Company have taken possession, and the land referred to in the bond, does not appear. When the notice was given, in 1846, the land required was distinctly shewn, and the quantity is the same as is mentioned in the bond; but there is nothing to identify the two pieces. Another objection is, the bond professes to secure interest from the time when the Company entered into possession. But the entering into possession, which is referred to in the bond, is evidently a future entering; whereas the Company entered into possession in November last, and they ought to pay interest from that time: but the bond does not secure that interest. The bond is also conditioned for payment to the Plaintiff or his representatives, or for a deposit in the Bank for his or their benefit. Therefore, no one but the Plaintiff or his representatives could be benefited by the bond. But the bond ought to protect the interest of all parties who are or may be interested in the land; and it is not sufficient to protect the interest merely of the party who professes to be the owner: *Poynder v. The Great Northern Railway Company (a)*.

Mr. *Bethell* and Mr. *John Baily*, for the Company.

If the Company committed any error in their first bond, they are certainly entitled to correct it as soon as possible, and thus comply with the 85th section; otherwise that section would be virtually struck out of the act if the Company made any false step. The bond required by the 85th section is to deal with two alternatives, either the payment to the parties, or the deposit for the benefit of the parties interested. Here the Company, having information of the

(a) 2 Ph. 330.

Plaintiff's title, treat with him as the interested party; and therefore the direction of the act is strictly complied with.

[The LORD CHANCELLOR.—The complaint is a singular one, because the party who raises it complains that the security is to himself, instead of being to the parties who may answer to a particular description.]

There is nothing to exclude the operation of the 85th section from any case where the Company want the land, and cannot come to terms with the owner. As to the identity, there is a certain quantity mentioned in the original notice from the Company, and there is a bond to secure the payment of the purchase-money for that exact quantity. The land is merely parcel of a larger piece, and has no boundaries by which it can be defined.

If there should be any question as to interest, the Plaintiff is not deprived, by this proceeding, of any right. He has all which this act provides for him, and anything further must be obtained by some other remedy.

Mr. *Rolt* replied.

The LORD CHANCELLOR:—

The question is, whether anything has been stated to shew that the Company have been guilty of any irregularity in the course which has been pursued, or in the bond that has been given, so as to justify the Court in restraining the Company from proceeding with their works, or dealing with the land under the authority given by the act. The whole amount of the money claimed has been paid into the Bank, and a bond has been given. Mr. *Willey* claiming to be, and being, as the Company are willing to assume, the lessee

1849.
 WILLEY
 v.
 THE SOUTH-
 EASTERN
 RAILWAY Co.
 —
Argument.

Feb. 10th
 —
Judgment.

1849.
 WILLEY
 v.
 THE SOUTH-
 EASTERN
 RAILWAY CO.
 —
Judgment.

for a certain number of years of the land in question, they have given him a bond according to the provisions of the act. [His Lordship read the condition of the bond.]

Now, by the act, whether the Company choose to purchase by agreement, or by arbitration, or by going before a jury, in all the various modes in which the Company are authorised to take possession of land, two sets of circumstances are contemplated. They may deal with a party upon his own title, and so conclude their contract with him; or he may be a party not having the whole interest in himself, but authorised to sell under the provisions of the act. In the latter case he is, of course, not entitled to receive the purchase-money himself; but provisions are made for securing the protection of those who may be entitled to a certain portion of the interest in the estate taken. But, if the Company deal with the party himself, there are circumstances under which he may not be entitled to receive the money until certain acts are done by himself; for instance, if he refuses to convey, or if he declines to make out his title under the provisions of the act, the money would not be paid to him till he has complied with those provisions, but would in the meantime be paid into the Bank. It therefore does not follow, because the Company recognise him as the owner of the interest purchased, that of necessity the money shall be paid to him—at least, in the first instance.

Then comes the 85th section, under which this Company have proceeded. The 85th section enacts, “that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the Bank, by way of security,

as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two Justices in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond"—(Now the first part of that provision has been complied with. The amount paid into Court is not an amount ascertained by any valuation, but is the whole amount of what is claimed by the party whose land has been taken)—“and also to give to such party a bond, under the common seal of the promoters, if they be a corporation, or, if they be not a corporation, under the hands and seals of the said promoters, or any two of them, with two sufficient sureties, to be approved of by two Justices in case the parties differ, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the Bank for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon, at the rate of 5*l.* per centum per annum, from the time of entering on such lands, until such purchase-money or compensation shall be paid to such party or deposited in the Bank for the benefit of the parties interested in such lands, under the provisions herein contained.”

Now, under that provision, it may be that the Company are dealing with a party who is not the actual owner, but who has the power to sell. In that case the money would come into the Bank. So they may be dealing with a party

1849.
 WILLEY
 v.
 THE SOUTH-
 EASTERN
 RAILWAY Co.
 —
Judgment.

1849.
WILLEY
v.
THE SOUTH-
EASTERN
RAILWAY CO.
—
Judgment.

whose title the Company are willing to recognise; but still a case may arise in which he would not be entitled to the payment of the money into his own hands. Therefore, the object of that section was evidently not to affect the prior power, but to take care that, in every case, provided the Company did what was required to be done by them under that act, in order to place the parties entitled to the land in a secure position with regard to the value of their interest, the Company might enter on the land and carry on their works, notwithstanding they had not become the purchasers of the land, but had deposited the amount in the Bank, or had given security for ultimately giving to the parties interested all the benefits which the act intended they should have in compensation for the lands.

In this case the Company have dealt with Mr. *Willey* as the owner of the lease; they were perfectly competent to do so. If they agreed with him, and ascertained the value of the leasehold interest, having bought his lease at a price so agreed on, they were not bound to look to any other parties; because they at their own risk deal with him as owner of the lease, and he claims as owner of the lease. Still they have to require from him, before he can receive the value of the land which the Company have taken, the performance of certain acts by which their title is completed. He must assign to them the lease; he must part with that which they have purchased before he can call upon them to part with the purchase-money. The mode in which the question arises here is, they only require to have the money kept in safety until the time should come when Mr. *Willey* should be advised to entitle himself to the money, upon the terms of doing all that he is compellable to perform before he can receive it. The bond, therefore, provides precisely for that event; nor do I know in what language that can be better provided for. It may be true, that Mr. *Willey*

might not be entitled to receive the whole of the money ; that is to say, they might have dealt with a party under the provisions of the act, not under his estate, but under his power of selling. But that is not the case here. Here they have dealt with him in respect of his own interest, and are willing to deal with him and to purchase his interest only ; requiring that they may have the means, as against him, of compelling him to deal with that interest so as to vest it in themselves.

1849.
 WILLEY
 v.
 THE SOUTH
 EASTERN
 RAILWAY Co.
 —
Judgment.

Now, the case of *Poynder v. The Great Northern Railway Company (a)* has been compared to this. I have looked at it several times in order to find out the similarity, but I cannot discover it. The company did not, in that case, deal with the party as having the beneficial interest ; but, on the contrary, the bond was in the general terms of the act, which are in the alternative, so that it might embrace the particular interest or any other interest. The money might be paid into court, not for the benefit of the party with whom they contracted for a particular interest, but paid into court for security and for the benefit of those entitled to other interests in the land. And the difficulty as to the bond there was, that though the money appeared to be paid into court upon both alternatives, in the language of the act, they made it payable to the party *on demand* ; so that there was an inconsistency in the condition of the bond. It did not appear that it was paid on account of the owner of the land, but on one or other account, and yet it was made payable to him on demand. The objection felt to that condition was, if it was payable to one individual, there was nothing to shew that that individual was the party entitled. Therefore, I altered the condition of the bond by leaving out the word “demand,” and putting in the words which are here, “payable as the case under the act might require,” or some-

(a) 2 Phil. 330.

1849.
WILLEY
v.
THE SOUTH
EASTERN
RAILWAY CO.
—
Judgment.

thing of that sort. You might suppose, therefore, that this bond was actually taken from the decision I came to in the case of *Poynder v. The Great Northern Railway Company*, and really that point has nothing to do with the present case; because here the Company have thought proper to deal with the individual in respect of his individual interest.

There were several other points taken, which I will shortly advert to. First of all, that the land was not identified. There is no question about the identity of the land. The parties have given notice to purchase the land, and the whole object of this bond is to secure the money payable in respect of that purchase, when it is ascertained. The Company gave notice of their intention to purchase a certain piece or portion of a piece of land numbered 18, which portion is described. That description is not objected to; and there is no matter of question between the parties, and the act raises no question whatever as to the identity of the land. The 85th section only provides the means by which the Company may take possession of the land identified by the prior transactions, and secure the payment of the purchase-money to the party entitled.

Then comes another objection, that, inasmuch as possession had been taken of the land before the bond was given, it was not a taking possession under the act. That was exactly the case in *Poynder v. The Great Northern Railway Company*. There had been possession under a defective bond. It might come to this, that the 85th section could never apply at all, if there had been any mistake in the bond—that is to say, if the exact provisions of the act had not been complied with in the first instance, the whole of the 85th section would be done away with; because, according to the argument, it would not be a taking possession under that section. It is impossible to maintain that; and, although this Court has very beneficially interfered to prevent abuses of power by these great Companies, yet there

must be something like equity as the foundation of the Court's interfering upon the mere abuse of power, which is the ground for injunction. Here, however, the party is asking, by a forced construction to be put upon the 85th section, to strike it entirely out of the act. Now, if the Court finds the means of doing justice between the parties, the Court will not interfere, except under such rules and provisions as may be useful and equitable for that purpose; and the Court, therefore, will not deal with an injunction, otherwise than by seeing that each party has that to which each party is entitled. There is possession taken, it is supposed erroneously taken, because the provisions of the bond are not according to the act; and in this case, as in *Poynder's case*, it was taken under a bond, which was not within the provisions of the act. Still I dealt with it as a possession: whether taken *de novo*, or to be continued in the hands of the Company under the provisions of the act, is not material. But the Company, having given to the owner of the land the benefit which the act intended he should have, the Court did not treat that as a transaction not according to the provisions of the act, not being within the provisions of the act, but dealt with it as being within the act itself. I consider that not only as correct under the terms of the act itself, but a point upon the act actually decided by the Court in other cases.

1849.
 WILLEY
 v.
 THE SOUTH-
 EASTERN
 RAILWAY Co.
 —
Judgment.

The condition of the bond I have already observed upon.

Then, upon the fourth point, namely, that the money was paid into the Bank, to the account of *Willey*: on that, as I have already said, if the Company think proper to deal with *Willey* as the owner of the land, it is quite right to pay it into the Bank on his account, because the Company recognise the title to the piece of land which they want to purchase; and it may very properly remain in the Bank until he performs that duty which he is bound to do.

1849.
WILLEY
v.
THE SOUTH-
EASTERN
RAILWAY CO.
—
Judgment.

There is one other point, which is, I confess, of some difficulty, but I do not think that it interferes with the course to be adopted as the result of the present case, because it does not immediately occur; which is as to interest from the time of entering into possession. The act provides, that interest shall be calculated from the time that the parties enter into possession; and a question, no doubt, may arise, when was the entering into possession. Because, if the Court finds that the bond was not according to the provisions of the act, but that the Company entered into possession under an erroneous bond, not good under the provisions of the act, then, when the consideration arises as to what interest is to be paid, the question may arise, whether the interest is payable from the time of the original possession, (not being a possession under the 85th section), or whether it should be calculated from the time at which the possession was set right by the condition of the bond being corrected. That does not appear to me to be at all a difficulty that affects the question of the injunction. Whether *Willey* or any other party, where the possession taken was irregular because the provisions of the act had not been complied with, has a right to treat that possession as a trespass or not, or whether to treat it as a rightful possession, and subjecting the Company to the payment of interest from that time, is a matter that does not arise on the question as to the injunction. It is a matter that may be material to be considered in some future stage of the transaction between the parties, but it is not one that at all affects the question of injunction.

I think, therefore, this is a case in which the Company are right in the bond given, and that they are right in their course of proceeding, under the provisions of the act; and that they are now rightfully in possession, under the terms of the 85th section; and the motion must be refused, with costs.

1848.

THE SOUTH-EASTERN RAILWAY
COMPANY v. MARTIN.

Nov. 25th.
Dec. 4th.

IN this suit a motion was made to restrain the Defendants from prosecuting an action at law. A similar application had previously been made to the *Vice-Chancellor of England*; who refused it, with costs.

Messrs. *Martin & Fox*, who were civil engineers and surveyors, had been employed by the South-Eastern Railway Company, between July, 1845, and April, 1847, in making surveys, and in other matters connected with several new lines of railway, which the South-Eastern Railway Company were then proposing to execute or oppose. During that time they received from the Company several considerable sums of money; and in October, 1847, they sent in their accounts, crediting the Company for all those sums, but claiming a balance of 6793*l.*: and in November following, they commenced an action in the Court of Exchequer for that sum against the Company.

In May, 1848, after the action was at issue, the Company filed this bill.

It stated, that the Defendants had executed various works for them as civil engineers and surveyors, and had made various purchases as agents for them, and incurred various expenses on their account; and that the monies which the Company had already paid exceeded the value of the works executed, and the purchases made, and the expenses incurred by the Defendants on account of the Company. That, in manner aforesaid, mutual accounts

The cases in which this Court will interfere to have complicated accounts taken in the Master's office instead of leaving them to be ascertained by an action at law, are difficult to define, and must be very much in the discretion of the Court.

Where surveyors had commenced an action against a Railway Company for a large balance claimed in respect of work done, and monies expended by them for the Railway Company, the particulars of demand in such action being 400 in number, but there being no dispute as to the sums paid by the Company on account, this Court refused to restrain the prosecution of the action, where the Railway Company had, by their bill, asked for a discovery as to numerous

documents, and stated that they should thereby be enabled to defend the action at law, and had not applied for an injunction till more than a year after the action had been commenced, and when it was likely to come on soon for trial.

1848.
THE SOUTH-
EASTERN
RAILWAY CO.
v.
MARTIN.
—
Statement.

arose between the Company and the Defendants which were still unsettled; and that the accounts which were rendered by the Defendants did not contain such a detail of particulars as would enable the Company to come to any satisfactory conclusion as to the propriety of the charges: that the particulars of the demand furnished in the action contained above 400 items of charge: that many of the charges were improper: that there were charges for personal services of the Defendants which were not rendered: that the charges for assistants were at exorbitant rates, and were for more parties than had been employed, and for a longer time than they were engaged: and that part of the works had been done by the Defendants for Mr. *Stephenson*, the principal engineer of the Company; and that the Defendants had included them in their accounts with him, and that he had included those charges in his accounts with the Company: and that the Defendants had charged for maps and other things which they had purchased, and which were retained by them as their own property.

The bill then charged, that the Plaintiffs could not successfully resist some portion of the claims of the Defendants, without a discovery of the circumstances in the bill stated; but that such discovery would enable them successfully to resist the same.

The bill asked for an inspection of all diaries, accounts, and memoranda of every description, which would tend to give any information respecting the matters in dispute; and also prayed that an account might be taken of the dealings and transactions between the Company and the Defendants; and that the Defendants might be, until the hearing of the cause, and thenceforth perpetually, restrained from prosecuting the action, and from commencing or prosecuting any other action in respect of the matters mentioned in the accounts in question.

Mr. *Stuart* and Mr. *J. Baily*, in support of the motion:—

Where there is concurrent jurisdiction between this Court and the Courts of common law, it is a question for the discretion of the Court whether it will interfere. Can the matters in dispute here be ever settled by a trial at law; or would they not be referred immediately to an arbitrator? This is not a simple action to recover on a *quantum meruit*; but it is involved in all the difficulties and complications which are usually found in a case of mutual and complex accounts, where the items are very numerous and the amounts are large. There are here 400 items of account. The Defendants have a claim against the Company for works done for them: they charge the Company in respect of money which they have laid out for them as agents in purchasing articles, and for money which they have paid to other persons on account of work done. Mutuality merely forms one element in complex accounts: but this case is involved in a variety of difficulties and complications; and it is therefore clearly within the rule laid down in *O' Connor v. Spaight* (a), that this Court will interfere where the accounts are too complicated for a Court of law to examine them. This case was cited, with approbation, in *The Taff Vale Railway Company v. Nixon* (b). In the latter case, a bill by a contractor against the Company for an account of the works done, and of the money due to him in respect of them, was sustained by the House of Lords.

Mr. *Bethell*, Mr. *Greenwood*, and Mr. *Taylor*, for the Defendants:—

In a case of mutual and complex accounts, this Court has concurrent jurisdiction with Courts of law: but this motion can scarcely succeed, unless this Court assumes exclusive jurisdiction in a case of very simple accounts where there is

1848.
THE SOUTH-
EASTERN
RAILWAY CO.
v.
MARTIN.
Argument.

(a) 1 Sch. & Lef. 309.

(b) 1 H. L. Cas. 121.

1848.

THE SOUTH-
EASTERN
RAILWAY CO.v.
MARTIN.

Argument.

no mutuality. Every sum paid by the Company on account has been duly credited, and there is no dispute about these sums; and the question is merely what is the amount of the balance which is still due.

In *The Taff Vale Railway Company v. Nixon*, the contractor *Nixon* assigned what was due to him from the Company to Mr. *Storm*, and the Company accepted *Storm* as contractor instead of *Nixon*, and paid monies to both of them; but a balance was still due from them: and the Company had placed themselves in the situation of stakeholders of the balance, and the suit was to determine to which of those two persons the balance should be paid. This case is merely a common action of *quantum meruit*. But even if there had been any difficulty in the accounts, the Court would refuse to interfere in consequence of the conduct and laches of the Plaintiffs. The bill was not filed till several months after the action was at issue; and then the real object of it was to obtain a discovery; and it states distinctly, that, if they obtained a discovery of certain matters, they could proceed safely to a trial at law: and no injunction was applied for till the month of November, 1848, when the action was almost standing for trial.

Mr. *Stuart* replied.

Dec. 4th.

Judgment.

THE LORD CHANCELLOR:—

I am of opinion that this is not a proper case for an injunction. It is applied for on the ground, that, under the circumstances disclosed in the pleadings, justice cannot be done, at least not so effectually done, by the trial of an action, as by an account taken before the Master. That may be; but it does not of necessity follow that the trial of an action ought to be restrained on that account.

The observations of the noble Lords in the House of Lords, in the case of *The Taff Vale Railway Company v. Nixon* (a), have been referred to as expressing an opinion that accounts ought to be decreed in all cases in which a reference would be directed at *Nisi Prius*. Now, I apprehend, that those observations were not intended to intimate any such opinion, but were meant only to exemplify the great difficulty of dealing with such cases at law. Be that as it may, I cannot see here any sufficient ground for exercising the equitable jurisdiction of this Court. In matters of account, it has rules of its own; and although the practical difficulty in proceedings at law does form a material consideration in the exercise of the discretion of this Court, the jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent inconvenience which might arise from the exercise of purely legal rights, or to enforce accounts in cases where Courts of law cannot enforce them; but the jurisdiction is concurrent with that of Courts of law, and is adopted because, in certain cases, this Court has better means of ascertaining the rights of the parties. It is, therefore, impossible, with precision, to lay down a rule, or to establish a definition as to the cases in which it may be proper for this Court to exercise this jurisdiction. The interests and the affairs of mankind would be injured by laying down any such rule. It is, therefore, necessary for this Court to reserve to itself a large discretion, in the exercise of which due regard must be had not only to the nature of the case, but to the conduct of the parties; and, in this instance, both concur in satisfying me that the trial of the action at law ought not to be stayed. It is not a case of mutuality of account, because the only items on the one side are certain payments by the Company, which are not in dispute. The only matter in contest is the amount of the claim of the surveyors for services rendered

1848.
 THE SOUTH-
 EASTERN
 RAILWAY CO.
 v.
 MARTIN.
 —
Judgment.

(a). 1 H. L. Cas. 121.

1848.
 THE SOUTH-
 EASTERN
 RAILWAY CO.
 v.
 MARTIN.
 ———
Judgment.

to the Company. They cannot recover for anything they do not prove to have been done under proper authority, or for more than they can prove such services to be worth. Whether the Defendants at law may have required discovery to meet such claims is not now in question. Whatever they established a right to, they have had. It is perfectly obvious, upon the face of this bill, that this was all the Plaintiffs originally sought; although, to avoid the immediate payment of costs, the bill is made to pray relief.

That such was the view the Plaintiffs in equity took of their own case is also pretty evident from their course of proceeding. In October, 1847, the account was delivered; in November, 1847, the action was commenced. In February, 1848, it was at issue; but the bill was not filed till the 12th of May, 1848. And although the answer was filed on the 24th of May, the motion for the injunction was not made to the *Vice-Chancellor* till the 13th of November; and now, the action standing for trial, I am asked to restrain the Plaintiffs at law from proceeding with the action. That this Court ought to be much influenced, in cases of this kind, by any unexplained delay on the part of the Plaintiffs, is stated in the case of *Thorpe v. Hughes* (a). It would, I think, be a matter of reproach to this Court, if, in a case of concurrent jurisdiction, a party, having proceeded at law up to the point of trial, should be restrained by injunction from trying his action, upon the application of parties who, during that period, without any adequate excuse, permitted him so to proceed without making any application to the Court. In the exercise of the discretion which is, in such cases, vested in the Court, I am of opinion, under these circumstances, the Court ought not to interfere, and that this motion should be refused, with costs.

(a) 3 My. & Cr. 762.

1848.

JACKSON v. THE NORTH WALES RAILWAY COMPANY.

Dec. 13th.

THE object of this suit was to establish the right of the Plaintiff, either to have a contract legally executed by the Company, so that their acceptance of the Plaintiff's tender for the execution of certain works would be binding upon them at law, or to be indemnified by the Company for the losses which he had sustained in consequence of their repudiating their agreement and abandoning the contract. The statements in the bill were to the following effect:—

The Company having made known their readiness to receive tenders for a portion of their works, the Plaintiff sent to them the following letter:—

“North Wales Railway.—Tender for Works from Bangor to Carnarvon.

“To the Directors of the North Wales Railway Company.
“Feb. 5th, 1846.

“GENTLEMEN,—I hereby undertake to make the line of railway, for a distance of eight miles and five-eighths, agreeable to the plans and to the satisfaction of Sir John Rennie, for a double line of works, and providing rails, chairs, sleepers, pins and keys, points and crossings, fencing and ballasting, for the sum of 141,000*£*, the whole to be done in a complete and workmanlike manner, and finished by the 31st of July, 1847. For a double line of works, and a single line of permanent way, the amount will be 115,000*£*. For a single line of works and a single line of permanent way, the amount will be 89,000*£*. The amount of four thousand

A contractor sent in a tender to a Railway Company for the execution of part of the works, either with a double or single line of rails. He was informed, in writing, by the engineer of the Company, that his tender was accepted, and that intimation was confirmed by the directors, upon his attendance at one of their board-meetings, but no document accepting the tender was executed by the Company in such a manner as to be binding at law; nor was any conclusion ever come to whether there should be a single or a double line. The railway was afterward abandoned, and the contractor then filed a bill seeking to have a binding contract executed by the Company, or to recover from

them the loss which he had sustained in preparing for the works:—*Held*, upon demurrer, that he had no claim to relief in equity upon the general merits of the case; and that an allegation, unsupported by any additional facts, that the Company held money in their hands for the purpose of paying the Plaintiff, and were trustees of it for his benefit, under an instrument in writing, was not sufficient to sustain the bill.

1848.
 JACKSON
 v.
 THE NORTH
 WALES
 RAILWAY CO.
 —
Statement.

five hundred pounds provided for stations, to be added to each of the before-mentioned amounts, 4,500*l.*”

The Plaintiff received the following reply from Sir *John Rennie*, the principal engineer of the Railway Company :—

“ *North Wales Railway.*

“ Adam-street, 16th February, 1846.

“ I beg leave to inform you, that the North Wales Railway Company have accepted your tender, the Board reserving to themselves the power of hereafter determining whether a double line or single line of works shall be adopted. I further beg to inform you, that the Board have expressed a wish to have an interview with you on Thursday next, and I will thank you to make it convenient to attend ; the hour of meeting shall be sent to you. I will thank you to acknowledge the receipt of this letter.

“ I am, your obedient servant,

“ JOHN RENNIE.”

The Plaintiff acknowledged the receipt of that letter, and attended the Board, where he was informed, by and on behalf of the Company, that Sir *J. Rennie* was authorised to accept the tender and to bind the Company.

The Plaintiff incurred considerable expenses in preparing for these works, and procuring different articles for them ; but, on the 5th of May, 1846, he received the following letter from the secretary :—

“ *North Wales Railway.*

“ The Board of Directors having had it intimated to them, at their meeting this morning, that you propose proceeding with the works on the proposed railway, and with that view are procuring materials, and this, too, in the absence of any existing contract, and notwithstanding what

passed between Sir *John Rennie* and yourself, on the 2nd of April last, and then communicated by the former to the Board, who were sitting, I am directed to request the favour of your attendance at the Company's offices, on Thursday next, the 7th instant, at twelve o'clock precisely, to meet the Directors, as, on a personal interview, all misunderstanding will be probably removed. Sir *John Rennie* has also been summoned to attend."

1848.
JACKSON
v.
THE NORTH
WALES
RAILWAY CO.
—
Statement.

The Plaintiff attended the meeting, and, on the 8th of May, he sent the following letter to the secretary :—

"Having waited on the Board of Directors of the North Wales Railway Company yesterday, agreeable to the wish expressed in your letter to me of the 5th instant, I have to regret having been told at that meeting that the Board did not think themselves justified in allowing me to proceed with the works on my contract with them, for that portion of the line from *Bangor* to *Carnarvon*; and the reason given for not allowing me to proceed was, 'If we (the Directors) make calls on our proprietors, we much fear they will not be paid; consequently, we cannot pay for the works as they proceed.' I beg to say, that any proposition the Directors may wish to make to me, shall have my immediate attention."

On the 16th of May, the secretary sent to the Plaintiff the following reply :—

"I have omitted noticing your letter of the 8th instant, in consequence of my having thought there would have been a Board meeting ere this, when I would have submitted the same for their consideration; but no such meeting taking place until Thursday next, I think it right to state, that the letter will then be laid before the Board. I beg to remark, that the account you give in your letter of

1848.
 JACKSON
 v.
 THE NORTH
 WALES
 RAILWAY CO.
 —
Statement.

what transpired at the Board, when you attended, is quite contrary to my recollection of what then passed, as it was clearly intimated to you, that there was no existing contract; and the reason of requesting your attendance was given solely because the Board had heard of your proceeding with the works in the absence of such contract."

On the 21st of May, the secretary sent to him the following letter:—

"In accordance with my note, your letter of the 8th instant was laid before the Board, at their meeting, held this day. I am instructed to forward you a copy of the resolution in regard to the same:—‘*Resolved*, That this Board, having had read to them a letter from Mr. *Jackson*, cannot but express their surprise at its tenor, inasmuch as it gives an erroneous account of what passed at the interview between them and Mr. *Jackson*; and the Board approves of the letter the secretary wrote Mr. *Jackson* in reply, also read to them; and, that, with a view to prevent any possible misunderstanding between them and Mr. *Jackson*, they at once disclaim any liability or responsibility, on account of any works or expenses already done or incurred by Mr. *Jackson*, there being no existing contract; and also will not sanction or authorise any future works or expenses, on the part of Mr. *Jackson*, until a regular and legal contract has been prepared and completed between the Company and Mr. *Jackson*.’ ”

On the 25th of May, the Plaintiff wrote to the secretary as follows:—

"I have to acknowledge the receipt of your letter, dated 21st instant, containing a copy of a resolution, passed by your Board; and, in answer to the same, I give you, for the information of the Board of Directors of the North

Wales line of railway, notice, that I hold them responsible to me for any loss or inconvenience I have or shall be put to, arising out of the non-fulfilment of the agreement, entered into with me by them, for the works on that portion of the line from *Bangor to Carnarvon*."

1848.
JACKSON
v.
THE NORTH
WALES
RAILWAY CO.
—
Statement.

On the 27th of July, 1846, the Plaintiff received from the Company's solicitor a draft contract, which contained several clauses of an unusual character, and such as were not warranted by the advertisement for tenders or the subsequent letters; and a proviso was inserted to the effect, that, if it should not be convenient for the Company to pay him the money which should be due to him upon the certificate of the principal engineer of the Company, he would consent to leave in the hands of the Company, for such time as might be required by them, not exceeding two years, a sum of money not exceeding 40,000*l.*, over and beyond the reserved fund of 10*l.* per cent., and other deductions according to the contract; and the Company were to give a bond under their common seal to secure the payment of the money to the Plaintiff, with interest, after the rate of 4*l.* per cent. per annum. The Plaintiff refused to execute such a contract.

The bill alleged that the Company had not recognised their acceptance of the tender by affixing their corporate seal to any document, or by the signature of any of the directors; but that the affixing of the corporate seal, as well as the signature of the directors, was, and had always been purposely and fraudulently withheld, in order and to the end that the Defendants might, at any time, either obtain the benefit of the preparations made by the Plaintiff, or, if it should suit them better, repudiate all legal liability in respect thereof; and, that they refused to execute any contract, or to recognise the Plaintiff as having contracted with them.

1848.
JACKSON
v.
THE NORTH
WALES
RAILWAY CO.
—
Statement.

The Plaintiff estimated the losses and damages sustained by him at about 4000*l*.

The bill charged, that the Company had money in hand for the especial purpose of paying the Plaintiff, and had been constituted and were trustees of such money for and on behalf of the Plaintiff, and him only, and in order to pay him what was due in respect of the matters aforesaid; subject only to the deduction thereout of the costs and expenses of their trust, and of the preparation and execution of the instrument by which they had admitted the possession of the said trust-monies on the trusts aforesaid: and subject thereto, the said money was held in trust for the said Company absolutely; and that the said trusts were declared by a written instrument.

The bill prayed for a decree, that, under the circumstances, the Defendants were liable to the Plaintiff for all damages and losses sustained by him in respect of the matters aforesaid; and that the amount thereof might be ascertained, either by a reference to one of the Masters of the Court, or by an issue; and, that the Company might be ordered to affix their corporate seal, or procure the signature of two directors to the letters of the 5th of February, 1846, and the 16th of February, 1846, or to some document referring thereto and accepting the terms thereof, so as legally to bind the Defendants, or, otherwise, that a proper contract, according to the terms of the said letters, might be settled and drawn up; and, that the Defendants might be ordered to affix their corporate seal, or to obtain the signature of two directors thereto; and might be ordered, on the trial of such action or actions as the Plaintiff might bring against them in respect of the matters aforesaid, to admit that the letters or other documents, or the contract, as the case might be, were and was duly and legally executed by them.

The Company put in a demurrer for want of equity, which was heard before the Vice-Chancellor *Knight Bruce*. His Honor was of opinion, that the allegation that the Company were trustees for the Plaintiff would prevent the Court from allowing the demurrer; but that, independently of that allegation, the Plaintiff would not have been entitled to relief.

1848.
JACKSON
v.
THE NORTH
WALES
RAILWAY CO.
—
Statement.

The Company appealed from that decision.

Mr. *Bacon* and Mr. *J. H. Palmer*, for the Company:—

Argument.

This case must be governed by *Kirk v. The Bromley Union* (a). The directors had no power to bind the Company, except by adopting certain forms, which were prescribed by the act, but which had not been attended to by these parties. The result is, that the Company are still at liberty to refuse the tender, if they think proper.

The allegation in the bill, as to the existence of a trusteeship on the part of the Company, for the benefit of the Plaintiff, is an argumentative deduction from the facts which are stated; and it will not assist the case, unless the Court is satisfied that the facts justify the inference: *Wormald v. De Lisle* (b); *Flint v. Field* (c).

Mr. *J. Russell* and Mr. *Giffard*, in support of the bill:—

This case differs from *Kirk v. The Bromley Union*, because here the omission to execute the contract in a binding, legal manner, is alleged to have taken place from a fraudulent intention on the part of the Company, so that they might reserve the power of accepting or refusing the

(a) 2 Ph. 640.
VOL. I.

(b) 3 Beav. 18.
G

(c) 2 Anstr. 543.
L. C.

1848.
 JACKSON
 v.
 THE NORTH
 WALES
 RAILWAY Co.
 —
Argument.

tender, as they chose, but telling the Defendant that they accepted it, and inducing him to incur expense.

The allegation of trusteeship may or may not be proved at the hearing of the cause, but it must be taken as true, for the purposes of the demurrer. The Plaintiff sets up a claim, and states that the Company have funds in their hands for the express purpose of paying it.

Judgment. The LORD CHANCELLOR (without hearing a reply):—

I agree in the opinion of the Vice-Chancellor *Knight Bruce*, as to the want of equity in this case. The contract—if it was a contract at all—was to make a portion of the railway. That most nearly resembles a covenant to build, which this Court will not enforce or interfere with.

Then comes the question whether what is alleged to have taken place in this case is sufficient to make such a contract as this Court will carry into effect. The contract was made, not by the Defendants, but by their agents. It was comprised in a proposal made by the Plaintiff in the alternative; and the charge in the tender was so much for a single and so much for a double line of rails. That alternative was never decided on.

It is said that the party who made the contract was the authorised agent of the Company: that the directors had by law and by their act of Parliament, power to charge and bind the Company by a particular mode of proceeding, but that they had no other power or means of doing so. As to the facts that the Company recognised Sir *John Rennie* as their agent, and that he had their authority for doing what he had done, and that the Plaintiff has incurred certain ex-

penses in preparing for the performance of his contract, I cannot see that these circumstances distinguish this case from *Kirk v. The Bromley Union*. In that case there was a binding contract between the Plaintiff and the Defendants for certain works; and it was provided, that, if any alterations were required, certain forms should be adopted in ordering them. Of course no alterations would be sanctioned so as to create a right on the part of the Plaintiff to demand payment unless those forms were followed out. But the parties did not comply with those forms; and, according to the opinion of the *Vice-Chancellor*, had waived them. And then, the forms not being followed out, but the Defendants having encouraged the builder in making those alterations, and having done everything which would bind an individual, the question was, whether such a state of things did not supersede the necessity for a contract as to any such work. What I said (a) was, "That this Court will not in general assume jurisdiction over such a contract, is clear. The recent decision of the Master of the Rolls, in *Ambrose v. The Dunmow Union* (b), is, I believe, the latest authority, and distinctly proceeds upon that principle. So the question is really reduced to this—Does the statement in the bill as to these extra works and deviations give the Court a jurisdiction, which, without such special facts, it would not have had? The *Vice-Chancellor* put his decision upon a well-known rule, that, notwithstanding an express stipulation in a contract, the parties may by their conduct waive it; and that, in this particular case, the provision, that the Defendants were not to be bound by any order for an alteration or deviation, unless in writing, did not prevent the Plaintiff from enforcing payment in this Court of the amount and value of such alteration and deviation, inasmuch as the Defendants had, by their conduct, induced him to believe that he would be paid

1848.
JACKSON
v.
THE NORTH
WALES
RAILWAY CO.
—
Judgment.

(a) 2 Phil. 648.

(b) 9 Beav. 508.

1848.
 JACKSON
 v.
 THE NORTH
 WALES
 RAILWAY Co.
 —
Judgment.

for the same, and would therefore be guilty of a fraud in withholding payment. This result would follow from any case in which a party could not recover his debt at law for want of writing; but that cannot be contended for, for the mere inability to enforce a legal debt at law does not give the party a remedy in equity.

“The case was compared to bills for specific performance of parol contracts; but in those cases the Court has jurisdiction in the original subject-matter, that is, the contract; and the question is, whether the want of writing shall deprive the Court of it. Here the attempt is to make the want of writing the ground of jurisdiction; but if this principle be sound, why may not all parol contracts, which the Statute of Frauds requires should be in writing, be enforced in equity, where the Plaintiff has acted, upon the faith of the contract, with the knowledge of the Defendant? The question between the parties is, does the provision in the contract protect the Defendants against the performance of these parol contracts? The bill assumes that it does, by praying that the Defendants may not be permitted to set up the objection.”

Then comes the other point. The bill alleges that the Defendants are trustees for the Plaintiff as to certain monies which they retain in their hands for the special purpose of paying him. But he is bound to shew how that trust arose. Can a party come here and say that a Defendant is a trustee, and be under no necessity to give the Court any information how the trust was created? The allegation of trust is merely a deduction of law. If the acts constitute a trust, the Court will exercise its jurisdiction in respect of it; but no such consequence will follow merely because a party alleges that there is a trust, without shewing how it arose. But the party shews here that no trust could have arisen. How could the Company have become trus-

tees for him? The bill alleges that they have monies in their hands to pay him; and that, as to those monies, they are trustees for him. But, according to his own bill, he has no other connection with the Company, except that he was induced to believe that he should have a contract with them; and, in consequence of that belief, incurred certain expenses. The trusteeship is a conclusion of law; but, although the Plaintiff is pleased to call it a trust, that will not affect the jurisdiction of this Court, where, according to the facts which are alleged, there is no trust.

1848.
JACKSON
v.
THE NORTH
WALES
RAILWAY CO.
—
Judgment.

The *Vice-Chancellor* seems to have been of opinion, that the allegation of trusteeship created a sufficient equity to sustain the bill, although it was an infinitesimally small degree of equity. My opinion is, that this equity is quite evanescent, and that, therefore, the demurrer ought to be allowed.

LORD v. THE COPPER MINERS' COMPANY.

Nov. 13th &
14th.
Dec. 5th.

THIS bill was filed in March, 1848, by *William Hind Lord*, on behalf of himself and all other the shareholders or corporators in a certain co-partnership or corporation, called "The Governor and Company of Copper Miners in Eng-

A shareholder in a trading Company, who possessed both original and preferential shares, filed a bill on behalf of himself and all the other share-

holders, except the Defendants, complaining of acts done by the directors and the other Defendants injurious to the interests of the Company. The suit had not been authorised by any general meeting of the shareholders; but the Plaintiff alleged that it was not practicable for any parties but the directors to call such a meeting. The acts complained of consisted of improperly increasing the liabilities of the Company, by contracting debts and otherwise, and of giving to some of the holders of preferential shares an advantage over others, by changing their shares for debentures. These acts were held to be within the general powers of the Company, and were done in consequence of, and, as the directors insisted, in accordance with, a resolution passed at a general meeting. A demurrer, on the part of the Company, for want of equity, was allowed, upon the ground that an individual shareholder was not entitled to be Plaintiff in a suit of such a nature; and that the interests of the original and preferential shareholders were not so identical as to admit of such a bill being filed on behalf of both sets of shareholders.

1848.
 LORD
 v.
 THE COPPER
 MINERS' CO.
 —
Statement.

as were Defendants, against the Governor and Company of Copper Miners, the Governor and Company of the Bank of England, and sixteen other Defendants, twelve of whom were the governor, deputy-governor, and assistants of the Mining Company (who constituted the directors, and were called the Court of Assistants); and the four last-named Defendants were holders of loan notes.

The statements in the bill were to the following effect:—

The Copper Miners' Company were incorporated by letters patent in 1691. The corporation was under the management of the governor, deputy-governor, and ten assistants; and power was given to the Governor and Company, and their successors, to hold courts for the purpose of consulting concerning the affairs of the Company; and certain provisions were made for the election of a governor, deputy-governor, and court of assistants by the plurality of votes of all who should then have any share or shares in the joint-stock of the Company, and certain courts were to be held annually for that purpose; and power was given to the Governor and Company, and their successors, to purchase and hold lands not exceeding the yearly value of 6000*l.*, and also goods and chattels to any amount; and to make and raise a joint-stock of any value whatsoever, and to augment and increase or reduce and diminish it as they should find convenient.

In 1841, a prospectus was issued by the then governors, in which it was proposed that the value of each existing share should be taken at 13*l.*, and that the capital of the Company should be increased, so as to consist of 1,000,000*l.*, divided into 10,000 shares of 100*l.* each; and it was stated that an actual capital of 650,000*l.* would probably be required.

A great number of shares was disposed of, and the busi-

ness of the Company was extended; but no accounts were ever rendered by the Court of Assistants to the shareholders at large; and the only information which the latter obtained of their affairs was gathered from the periodical reports made by the former at the half-yearly meetings of the Company. Several passages from these reports, extending from the year 1841 to the year 1846, were set out in the bill, and they all represented the affairs of the Company as being in a state of great prosperity.

1848.
 LORD
 v.
 THE COPPER
 MINERS' Co.
 Statement.

On the 8th of April, 1846, a general meeting of the shareholders was held, at which a resolution was passed, "That such sum, not exceeding 500,000*l.*, as the Court of Assistants shall think fit, be raised by the issue of preference shares, of 25*l.* each, in the stock of the Company; the holder of such shares to be entitled for each half-year to such preferential dividend as may be agreed on by the Court of Assistants (not exceeding the rate of 1*l.* 17*s.* 6*d.* per annum on each share paid up in full) before the payment of any dividend for the same half-year to the other shareholders, but not to be entitled for any half-year to a dividend beyond the preferential dividend, unless or until a dividend to the like amount shall have been paid for the same half-year to the other shareholders; after which, the holders of the preference shares and the other shareholders shall take rateably any excess of dividends which may be declared. That a condition shall be annexed to such preference shares, that it shall be lawful for the Company, at any time after the expiration of a term not exceeding ten years, to require the surrender of such shares, on payment of such sum, not exceeding 30*l.* per share, as may be agreed upon by the Court of Assistants on the issue of the share. That for the purpose of carrying on the affairs of the Company, pending the issue of the preference shares, the Court of Assistants shall have power from time to time to borrow, on mortgage of all or any of the hereditaments and

1848.
 LORD
 v.
 THE COPPER
 MINERS' CO.
 —
Statement.

property of the Company, such sum and sums of money as they shall from time to time deem necessary for carrying on the business of the Company; and that the common seal of the Company may and shall be affixed to such assurances or documents as may be required for that purpose." The Court of Assistants came to certain resolutions in order to carry this plan into effect, which resolutions were confirmed by an extraordinary general meeting of the shareholders, held in June, 1846; and, in pursuance thereof, 16,000 preferential shares, of 25*l.* each, were issued, and a sum of 400,000*l.* was raised thereby. Of these shares the Plaintiff took 400, on which he paid the deposit and all the calls, and for which he received scrip certificates. The bill alleged, that the title of the shareholders to their shares was completed upon their receiving the scrip certificates, and that there never was any general registry of the shareholders or corporators, but that all the persons who had been registered as such shareholders or corporators had been so registered at their own instance, and on their own application only, and that such persons constituted a very small minority of such shareholders or corporators.

When the 400,000*l.* had been raised, the Court of Assistants reported to the shareholders that they had accomplished the objects contemplated by the resolutions of the 8th of April, 1846, and had discontinued the issue of the preferential shares. At the same time, they gave the shareholders an account of the profitable working of the Company, and declared a dividend of 7*l.* 10*s.* per cent. on the preferential shares, and of 5*l.* per cent. on the original shares. This was in April, 1847. In September, 1847, the affairs of the Company became so embarrassed, that it was no longer practicable to withhold the real state of the case; but the Court of Assistants first endeavoured to raise more money from the preferential shareholders, and convened a meeting of them for that purpose; but at the

meeting it transpired that some of the preferential shares had been converted into debentures, or loan-notes. On making this discovery, the Plaintiff offered to convert his preferential shares into debentures, but the Court of Assistants refused his offer, and he was informed that they were under a promise to the Bank of England not to convert any more. Upon this, the preferential shareholders rejected all proposals for a fresh advance. The Court of Assistants then called a general meeting of all the shareholders, which was holden on the 13th of October, 1847. They then stated that the Company was much embarrassed, and that the Court of Assistants had made an arrangement with the Bank of England, who had agreed to advance them 270,000*l.* upon the security of the property of the Company in *Wales*. 150,000*l.* was to be applied in payment of a debt which they had already contracted with the Bank, and the remainder was to be paid by the Bank to the Company.

1848.
 LORD
 v.
 THE COPPER
 MINERS' CO.
 —
Statement.

The shareholders had not received any notice of the object of the meeting, and they knew nothing of the embarrassments of the Company, beyond what had been stated to the meeting of the preferential shareholders. They therefore asked for some further explanation respecting the liabilities of the Company. But the Court of Assistants refused all explanation until the arrangement with the Bank should have been ratified; and they stated to the shareholders that the Company would be utterly ruined if they did not comply. The bill described the shareholders as being in a state of great excitement and anxiety; and it stated, that, under these circumstances, a resolution confirming the proposed arrangement with the Bank was carried, and immediately afterward the common seal of the Company was duly affixed to an indenture already prepared, being an indenture of mortgage of the mining property of the Company in *Wales*, to the Bank of England,

1848.
 LORD
 v.
 THE COPPER
 MINERS' CO.
 —
Statement.

to secure a sum of 270,000*l.* Two of the directors of the Bank of England were then members of the Court of Assistants of the Mining Company. Since that time, the Plaintiff had been duly registered as the holder of his preference shares, and also of some original shares. Several of the preferential shares, or scrip which entitled the holders thereof to such shares, had been commuted at par for debentures, or loan-notes, under the seal of the Company, payable at the expiration of ten years, and bearing interest in the meantime at 5*l.* per cent.

In December, 1847, the Plaintiff sent a letter to the Court of Assistants, protesting against the payment of any interest to the holders of debentures, or loan-notes, created by the conversion of preferential shares or scrip.

At another meeting of the shareholders, held on the 11th of February, 1848, a resolution was passed to the following effect:—"That the Court of Assistants be authorised to affix the common seal of the Corporation to a deed, to be prepared under the advice of the Company's solicitors, vesting the property of the Company in trustees, with power of sale of all or any part of the property, from time to time, for the liquidation of debts, and to protect the interests of all concerned."

The bill insisted, that, by the constitution of the co-partnership, there was no power for any one or any number of the shareholders or corporators at large to call a general meeting of proprietors; but that such powers resided wholly in the Court of Assistants; and that the said Court refused to call any meeting for the purpose of taking into consideration the matters mentioned in the bill, or any of them; and the Plaintiff was wholly ignorant of the names and places of abode of the great majority of the shareholders or corporators; and the Defendants refused to dis-

cover who such shareholders or corporators were, and where they resided respectively.

The bill charged that the Court of Assistants had issued, at a heavy discount, to the Defendants constituting the Court, and also to the four Defendants who were named last in the bill, divers loan-notes or promissory-notes, sealed with the common seal of, and purporting respectively to be promises by, the Governor and Company of Copper Miners in England, to pay the monies therein mentioned; and that the Court had represented and treated such loan-notes, or promissory-notes, as negotiable instruments, and as transferable by delivery only; and that some of such notes had been transferred to, and were then holden by, the Bank of England, which claimed to be the owner thereof; and the residue of such notes were then holden respectively by those of the Defendants to whom the same were issued respectively, and who claimed to be the respective owners of the same.

The bill then charged that the Court had no authority to issue such loan-notes, or promissory-notes, but that the same were unlawful in their creation, and were invalid, and ought to be delivered up to be cancelled; that the Court of Assistants had no authority (excepting such authority as was conferred by the meeting of April, 1846) to increase the capital stock of the co-partnership beyond the sum of 650,000*l.* mentioned in the prospectuses; but that the Court had, in excess of their authority in that behalf, increased such stock to a very great extent; that the resolutions passed at the general meeting in April, 1846, gave the Court of Assistants authority to raise no more money than the sum of 500,000*l.*, and by no other method than the issue of the preferential shares; and that the Plaintiff and the other preferential shareholders accepted such preferential

1848.
 LORD
 v.
 THE COPPER
 MINERS' Co.
 —
Statement.

1848.
 LORD
 v.
 THE COPPER
 MINERS' Co.
 —
Statement.

shares on the faith and understanding that the amount raisable thereby would not exceed the sum of 500,000*l.*, and that all such preferential shareholders would continue alike on the footing of shareholders or corporators of the co-partnership; and that the Court of Assistants had themselves limited their authority to an authority to raise 400,000*l.*; but that the Court had raised a large sum of money in excess of their last-mentioned authority.

The bill further charged, that the Court of Assistants had no power or authority whatever, and that the Company had no power or authority whatever, without the consent and sanction of every individual shareholder or corporator, to convert any of the preferential shares, or any of the scrip certificates, into debentures, or promissory or loan notes of the Governor and Company of Copper Miners in England; or to mortgage or charge their property without the consent of a majority of the shareholders; and that the consent of the meeting of the 13th of October, 1847, to the arrangement with the Bank of England was obtained under the circumstances of concealment and pressure set forth in the bill. The bill also charged, that, previously to October, 1847, the Bank of England held several debentures, or loan or promissory notes, payable at long dates, and having then many years to run; but that the Bank of England, by their arrangement with the Company, had all their debt secured by mortgage, or made payable immediately. And it further charged, that the Defendants had full notice of the several charters; and that the Court of Assistants were the officers of the Company and trustees for the Plaintiff and the other shareholders and corporators; and that the Court were acting contrary to their duty, and in derogation of the rights of the Plaintiff and the shareholders or corporators in the premises; and that it was the duty of the Bank of England, and all such other persons as lastly afore-

said, to ascertain the extent of the powers and authorities of the Court of Assistants; and that all the wrongs and breaches of trust stated and charged were committed by the Court of Assistants in collusion with the other Defendants. It also charged, that the Court of Assistants had purchased, with the Company's money, a large number of shares in their own names, which gave them such a number of votes that they were able to carry any resolution they pleased at the general meetings, and that they did so for the purpose of carrying their own designs into effect, and of refusing all redress to the shareholders.

1848.
 LORD
 v.
 THE COPPER
 MINERS' Co.
 —
Statement.

The bill prayed for an account of all monies raised or borrowed by the Court of Assistants, purporting to be for the use of the Company; and that what should be found to have been due from the Company to the Bank of England, but which was, previously to the meeting of October, 1847, payable at some future time, might be declared to be payable at such future time; and that every loan-note, promissory-note, and debenture holden by any of the Defendants, and issued without due authority, might be delivered up to be cancelled; and that the Court of Assistants might be decreed to make good to the Plaintiff and the other shareholders all losses occasioned by the breaches of trust committed by the Court of Assistants; and that it might be declared that the mortgage to the Bank of England was improperly obtained, and that it might be delivered up to be cancelled; or if it was a good security for 120,000*l.*, then that it should stand as a security for that amount only.

The Company, and also the Court of Assistants, demurred separately to this bill, for want of equity. The two demurrers were heard before the Vice-Chancellor *Knight Bruce*, who overruled them, stating, that part at least of the relief prayed was proper on the facts alleged and charged; and

1848.
 LORD
 v.
 THE COPPER
 MINERS' Co.

Statement.

that the resolution of the 11th of February might be thought enough of itself to support the bill.

The demurring parties appealed from this decision.

Argument.

Mr. *Bethell* and Mr. *Willcock* appeared in support of the demurrers, and contended, that the injury which was complained of affected the Company, and was not a personal injury to the shareholders in any manner except as members of the Company; and, therefore, the Company alone, as a general rule, could institute such a suit; and there were no special circumstances to take this case out of the general rule: *Foss v. Harbottle* (a), *Attorney-General v. Wilson* (b), *Mozley v. Alston* (c). The proprietors had power to convene a meeting and to come to a resolution that such a suit as this was expedient, but no such step had been taken. The proceedings which were complained of were within the powers of the Company, and were not disapproved of by any meeting of the shareholders: *The Exeter and Crediton Railway Company v. Buller* (d). In the next place, these transactions took place before the Plaintiff became a registered proprietor, and therefore he had not sustained any injury; and, lastly, the bill did not shew that any injury had arisen, or was very likely to arise, to the Company from any of the acts which were mentioned; but a variety of transactions was stated by which loss might or might not be occasioned. [*Hichens v. Congreve* (e), *Adley v. The Whitstable Company* (f), *Ward v. The Society of Attornies* (g), *Blakemore v. The Glamorganshire Canal Navigation* (h), were also cited.]

(a) 2 Hare, 461, 497.

(b) Cr. & Ph. 1.

(c) 1 Ph. 790.

(d) 16 Law Journal, 449.

(e) 4 Russ. 562.

(f) 17 Ves. 315; 19 Ves. 304;

1 Mer. 107.

(g) 1 Coll. 370.

(h) 1 My. & K. 154.

Mr. *J. Russell*, Mr. *Rolt*, and Mr. *Hobhouse*, contra, insisted, that there was no rule that a shareholder could never in any case file a bill, as Plaintiff, to complain of an injury done to the corporation; and that the special circumstances of this case were sufficient to sustain such a bill. The managers of the Company had shewn a determination to do certain acts which were beyond the powers conferred upon them by their charter, and by which the shareholders would sustain almost certain loss. They had exchanged certain shares for debentures, thereby increasing the amount of their debts, and giving the holders of those debentures an unfair preference over the other shareholders. That the Company being in a state of insolvency, their debts were increased by this change, and the real *bonâ fide* creditors would receive a smaller sum; they had issued loan-notes and debentures, which they were not empowered to do; and the borrowing of money from the Bank of England, and the steps taken to secure its repayment, were all *ultra vires*. The resolution also to vest their property in trustees was one which would in itself sustain the bill. There was an improper conversion of the property, and an improper alienation of the property. It was evident, from a comparison of the reports with the subsequently appearing facts, that the Court of Assistants had been deceiving the shareholders grossly as to the state of the Company's affairs; and now they refused to give any account or explanation of the matter. Then, their power of swamping the general meetings prevented the aggrieved shareholders from obtaining any redress within the corporation itself, and took the case out of the principles on which *Mozley v. Alston* (a) and *Foss v. Harbottle* (b) were decided. All these transactions inflicted a common injury upon the general body of shareholders; and, therefore, the Plaintiff was entitled to file this bill on their behalf:

1848.
 LORD
 v.
 THE COPPER
 MINERS' CO.
 —
Argument.

(a) 1 Phil. 790.

(b) 2 Hare, 461.

1848.
 LORD
 v.
 THE COPPER
 MINERS' CO.

*Ware v. The Grand Junction Water-Works Company (a),
 Preston v. The Grand Collier Dock Company (b), Colman v.
 The Eastern Counties Railway Company (c).*

Argument.

Mr. *Bethell* replied.

Dec. 5th.

The LORD CHANCELLOR:—

Judgment.

This is one of those experiments which are now frequently made to bring the various questions arising out of the transactions of Joint-stock Companies within the jurisdiction of this Court. I have had occasion before to observe upon the duty of the Court to adapt its practice to the varying wants of the public; but I am not insensible to the danger of carrying this principle too far, and assuming a jurisdiction which this Court may not have the means of exercising so as to promote the object of the suitors. It is very difficult to draw the line. Cases of this kind are, therefore, attended with great difficulty; and I have, in this instance, to regret, that, in executing the duty of reviewing the decision of Vice-Chancellor *Knight Bruce*, I have not the benefit of being informed of the grounds on which it was founded. His Honor merely stated, that, in his opinion, there was no defect for want of parties, and that there was at least some grounds for the relief prayed; and that the resolution of the 11th of February only might be thought enough to support the bill. I postponed my judgment, not on account of any difficulty I felt in this particular case, but because I thought it important, so far as possible, to act in conformity with some recent cases, and to explain the principles on which the course of practice of this Court ought, in my opinion, to be founded.

(a) 2 Russ. & My. 470.

(b) 11 Sim. 327.

(c) 10 Beav. 1.

The object of the bill is, first, an investigation and correction of an alleged arrangement with the Bank of England, confirmed at a special general meeting of the shareholders or corporators on the 13th of October, 1847, and to set aside or reduce the mortgage made to the Bank by the Company, in pursuance of that arrangement; secondly, for the purpose of restraining the Company from carrying into effect a resolution, passed at a special general meeting on the 11th of February, 1848, for vesting the property of the Company in trustees for the purpose of sale for the liquidation of debts, and to protect the interests of all concerned; and to prevent the payment of any debenture, note, or debt to any of the Defendants, which may appear not to be a proper debt of the Company; and, for that purpose, as it would appear, to take an account of and investigate all sums raised by the Company. It will be found that all the acts complained of are acts of the whole corporation; and that each is authorised by the powers of the Company specially given, if that be necessary, by the charter of 1691, as set out in the bill. [His Lordship stated the powers thereby conferred upon the Company and the Court of Assistants.]

1848.
 LORD
 v.
 THE COPPER
 MINERS' Co.
 Judgment.

The bill alleges various schemes for increasing the capital of the Company. A resolution was unanimously adopted at a general meeting on the 8th of April and the 10th of June, 1846, for that purpose, authorising the issue of preferential shares and the borrowing of money on the property of the Company. The bill alleges, that the Plaintiff, in July, 1846, obtained scrip certificates for 400 preferential shares, which, however, were not registered till after the 13th of October, 1847, with knowledge, it must be assumed, of all the preceding transactions, and particularly the resolution of the 8th of April, 1846, under the authority of which the preferential shares were issued, and by which they were made redeemable by the Company, after the expiration of ten years, on the payment of not more than 30*l.* a share.

1848.
 LORD
 v.
 THE COPPER
 MINERS' CO.
 —
Judgment.

The bill then states the meeting of the 13th of October, 1847, at which the arrangement with the Bank of England for a mortgage of 270,000*l.* was unanimously agreed to. The bill then alleges, that, upon an exchange of preferential shares, the Plaintiff became and now is entitled to certain original shares; and thus alleging himself to be entitled to both descriptions of shares, and filing his bill on behalf of himself and all other the shareholders or corporators of the Company, he assumes a unity of interest in all such shareholders in the object of the suit.

The only other matter necessary to be observed on is the complaint made of the resolution of the 11th of February, 1848, authorising the vesting of the property of the corporation in trustees for the purpose of paying its debts. This is the allegation which the Vice-Chancellor *Knight Bruce* is reported to have said was of itself sufficient to support the bill. But I have not been informed whether this was supposed to be an excess of authority, or an improper use of it. I cannot consider it as either. The bill indeed contains various charges of improper issuing of notes, debentures, and other securities by the Defendants; but the allegation is much too general to be of any avail; and, although such securities are alleged to have been issued at a heavy discount, I do not find any allegation that such securities were worth more.

The principal ground of complaint is the alleged conversion of preferential shares into debentures, and issuing debentures on account of preferential shares. No particular case is stated amounting to a fraudulent benefit conferred upon any individual by such means; but the objection is made to the system adopted. If this was fairly done, it does not appear what objection can be made to it. It can only be done with the concurrence of the holders of the preferential shares; and, if the debentures given are not of more value

than the shares, no injury is done. There is no charge that they are so. If the other preferential shareholders shall allege, that they are injured by the creating of debts which come in before them, in lieu of the preferential shares that come in with them, the original shareholders cannot join in any such case. The creditors and preferential shareholders have a priority to them ; and yet the Plaintiff makes this complaint on behalf of both sets of shareholders. This objection would be fatal to the bill in its present form.

1848.
 LORD
 v.
 THE COPPER
 MINERS' Co.
 Judgment.

This is not, however, the point on which I decide this case. I find that all the complaint made by the individual shareholders, relates to acts within the powers of the corporation, and all sanctioned by general meetings of the shareholders ; and there is no allegation raising any case for the interference of the Court of equity with the exercise of such rights.

If a Court of equity were to assume jurisdiction in such a case, could it do so without opening its doors to all parties interested in corporations, or joint-stock companies, or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere with the conduct of the majority ? This cannot be done ; and the attempt to introduce such a remedy ought to be checked, for the benefit of the community.

In *Foss v. Harbottle* (a) Sir James Wigram acted on this principle, because the acts were capable of confirmation ; and in *Mozley v. Alston* (b) I expressed my strong approbation of Sir James Wigram's decision in that case. Here the acts have been actually confirmed, and are, therefore, the acts of the whole body.

(a) 2 Hare, 461.

(b) 1 Ph. 800.

1848.

LORD

v.
THE COPPER
MINERS' Co.*Judgment.*

There is no case which calls upon this Court to entertain such a suit; and the evils of doing so, I think, would be very serious. I, therefore, think the demurrers must be allowed.

Dec. 16th.

In re THE BOROUGH OF ST. MARYLEBONE
JOINT-STOCK BANKING COMPANY, *Ex parte*
WALKER, *Ex parte* TROUTBECK.

In order to obtain an order under the Joint-stock Companies Winding-up Act, 1848, for the dissolution of a Company and the winding-up of its affairs, it is not essential that there should be debts of the Company remaining unpaid; nor is it an objection that a suit is still pending, which has been instituted on behalf of the shareholders against the directors, for the purpose of making them personally liable for certain losses, but not asking for the dissolution of the Company.

TWO petitions had been presented in this matter, and in the matter of the Joint-stock Companies Winding-up Act 1848; one by Mr. *Edmund Walker*, and the other by Mrs. *E. Troutbeck*, and Miss *Maria* and Miss *Margaret Stephenson*, all of whom were contributories within the meaning of the act, and Mr. *Walker* had also been one of the directors. Both of them prayed for the dissolution and winding up of the Marylebone Banking Company.

They were heard before Vice-Chancellor *Knight Bruce*, on the 8th of December, 1848, who made one order on the two petitions; by which it was ordered that the Company should be dissolved as from that day, and be wound up under the provisions of the Joint-stock Companies Winding-up Act.

A motion was now made before the *Lord Chancellor*, on behalf of Mr. *Abraham*, one of the shareholders in the Banking Company, that that order might be discharged. Neither of the petitions had been served upon him, but he was the only person who offered to oppose the application before the *Vice-Chancellor*, and he was allowed to be heard there.

It appeared from the statements in the petitions, that

the Company was formed in 1836 : that in 1841 their affairs became embarrassed ; and in 1842 a bill was filed on behalf of the shareholders against the directors (*a*), for the purpose of fixing certain losses on the directors personally : that this suit was still pending, but no decree had been obtained in it ; and that the bill did not pray for a dissolution of the Company, nor did it seek to compel the general body of shareholders to contribute to the payment of the liabilities of the Company : and that the Company had not been dissolved, but had ceased to carry on business, and their affairs were not completely wound up.

1848.
In re
THE ST.
MARYLEBONE
JOINT-STOCK
BANKING CO.,
Ex parte
WALKER.

Statement.

Mr. *Glasse*, for the motion, contended, that this case did not come within the Joint-stock Companies Winding-up Act, inasmuch as there were no public creditors of the Company, and no unpaid debts ; that, even if that objection were overruled, the pendency of the suit was a sufficient reason for the Court to refuse to entertain such a petition, particularly as the petitioner, Mr. *Walker*, was one of the Defendants ; and that, at all events, it would be desirable that a reference should be made to the Master, as a preliminary matter, to inquire more fully into the particulars of the case, before the Court acceded to the prayer of the petitioners.

Argument.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Hetherington* appeared to support the order of the *Vice-Chancellor*, but were not called upon.

(*a*) *Deeks v. Stanhope*, 14 Sim. 57. The demurrer to the original bill having been allowed, the bill was afterward amended by

confining the prayer for relief to the effect as stated in the present petition.

1848.

In re
THE ST.
MARYLEBONE
JOINT-STOCK
BANKING CO.,
Ex parte
WALKER.
 —
Judgment.

The LORD CHANCELLOR :—

I do not see that there is any ground for doubt on the construction of the act of Parliament. First of all, the objection is, that the Company, with respect to which the application is made, does not appear to have any persons claiming as creditors. That is not at all essential to the jurisdiction given under this act of Parliament, which is not confined to Companies which have creditors, or merely to pay debts; but it is for the purpose of enabling those, who have entered into these speculations, to escape from them as far as possible. The description is, “If any Company shall have been dissolved, or shall have ceased to carry on business(*a*).” Here is a Company which has not been dissolved, except so far as they have dissolved themselves; but they have ceased to carry on business. They have not only ceased to carry on business, but a suit is depending for the purpose of winding up the affairs of the Company, and realising what are supposed to be the assets of the Company, by establishing claims against individuals; but the act says (section 58), that, notwithstanding the pendency of such a suit, it shall nevertheless be competent for the Court to exercise the jurisdiction given to it by this act. Therefore, as far as the description of the Company goes, it falls directly within the seventh head of a Company which has ceased to carry on business, or which is carrying it on only for the purpose of winding up. Here, it is not carrying on business for the purpose of winding up; but there is an actual cessation of business, and an actual pending application to a Court of Equity for the purpose of winding up.

It is, therefore, a case, in which those who constitute the Company shew that they are not in a condition to go on with the undertaking—a fact evidenced by one of the acts

(*a*) 11 & 12 Vict. c. 45, s. 5, art. 7.

of these subsisting partners. That is exactly the case which the act contemplates. It was never intended to apply to those persons who associated themselves together and were going on with their business, and to enable any dissatisfied member to come to the Court and say, "You shall no longer go on; let us wind up." But when such evidence is afforded that the Company cannot carry on the business, and that the difficulties are found to be insuperable in disentangling the parties from the concern in which they so engaged, you then find the description of persons for whom the act was intended; and this Company, as it appears to me, comes distinctly within the provisions of the seventh head of the fifth section.

With regard to Mr. *Walker*, assuming all that is stated, that he is a party against whom claims are made, for the purpose of making him individually contribute a sum of money towards the claims of the other members of the Company, what is there that disqualifies him from applying to the Court? It does not interfere with the claims against him. It is true, the Court will probably not be able to come to a final decision under that reference, until, in some way or other, that suit is disposed of; nor will the amount of assets be ascertained, till it is settled whether the individuals, sought to be affected by that suit, are or are not liable to their co-adventurers. Those who prosecute that suit are quite competent to go on with it. They undertook it, and have prosecuted it, looking to their own purposes in carrying it on. If they succeed, the funds will be not only for the purpose of paying the expenses of the suit, but for division among the contributories. This proceeding does not interfere with that. The clause, which contains a provision that the pendency of a suit shall not interfere with the jurisdiction under the act, must have contemplated every description of suit, unless the circumstances shall appear to be such as to make it inexpedient

1848.

In re
THE ST.
MARYLEBONE
JOINT-STOCK
BANKING CO.,
Ex parte
WALKER.

Judgment.

1848.

In re
THE ST.
MARYLEBONE
JOINT-STOCK
BANKING CO.,
Ex parte
WALKER.

—
Judgment.

to make an order for winding up the affairs until the suit is determined. I cannot think that is necessary here. That suit, so far as it seeks to affect individual members with personal liability, remains in full operation. With regard to the other portion of it, namely, the winding up, it is much more speedily and effectually obtained by an order under this act, than it would be by any decree; so that I consider that suit, so far as it is essential to the winding up, not at all interfered with: but, as to the greater portion of the relief sought by it, a much more speedy remedy is afforded, under the act, than there would be by making the suit to go on, to the extent, at least, of asking a decree for a general winding up.

Now, with regard to the other point, whether I should make a preliminary inquiry as to the expediency of interfering on this matter under the powers of the act; unless it is laid down that that sort of preliminary inquiry is always to precede the exercise of the jurisdiction under this act, I do not see any ground for it here, or any special case. No doubt there may be circumstances brought before the Court, which the Court might think require investigation before it would come to a conclusion; but when I find the Company actually among themselves agree that they cannot go on, I think that is enough to shew, that it is expedient that they should be dissolved, and that the distribution should take place; and that is all that the order provides for. It only provides for an effectual, expeditious, and comparatively cheap mode of effecting that which all parties agree must be carried into effect between themselves. Therefore, without adverting to what may be the proper order in other cases, I do not see any ground on which I can require any further information, to justify the order which the *Vice-Chancellor* has made; and I think that it must be affirmed, with costs.

1848.

TULK v. MOXHAY.

Dec. 21st &
22nd.

THIS was a motion, by way of appeal from the *Master of the Rolls*, to dissolve an injunction.

In the month of July, 1808, the Plaintiff was seised in fee-simple not only of the piece of ground which formed the open space or garden in *Leicester-square*, but also of several houses situated in that square.

By an indenture of release, dated the 15th of July, 1808, and made between the Plaintiff, of the one part, and *Charles Elms*, of the other part, after reciting that the Plaintiff was seised of that piece of land in fee-simple, and had contracted to sell it to *Elms*, but not reciting that that contract was made subject to any condition, in consideration of 210*l.*, the Plaintiff conveyed to *Elms*, in fee-simple, “all that piece or parcel of land, commonly called *Leicester-square* Garden or Pleasure-ground, with the equestrian statue then standing in the centre thereof, and the iron railings and stonework round the garden, and all easements or ways, &c., to hold the same to *Elms*, his heirs and assigns for ever.” And in that indenture there was contained a covenant by *Elms*, in the words following:—“And the said *Charles Elms*, for himself, his heirs, executors, administrators, and assigns, doth covenant, promise, and agree to and with the said *Charles Augustus Tulk*, his heirs, executors, and administrators, in manner following—that is to say, that he, the said *Charles Elms*, his heirs and assigns, shall and will, from time to time, and at all times for ever hereafter, at his and their own proper costs and charges, keep and main-

A purchaser of land, which was conveyed to him in fee-simple, covenanted for himself, his heirs, executors, administrators, and assigns, with the vendor, his heirs, executors, and administrators, that the land should be used and kept in ornamental repair as a pleasure-garden, for the benefit of the occupiers of houses in the neighbourhood which belonged to the vendor:—*Held*, that the vendor was entitled to an injunction as against the assigns of the purchaser, to restrain them from building upon the land, although the character of the neighbourhood had been greatly changed by the increase of building there, and its privacy as a place of residence had been very much diminished by the opening of thoroughfares, and the occu-

piers of the vendor's houses had ceased to use the garden, or to pay for the privilege of doing so; and although the vendor had not obtained any decision, in a court of law, whether the covenant did or did not run with the land, so as to be binding on the parties who claimed under the original purchaser. The jurisdiction of this Court, in such cases, is not fettered by the question whether the covenant does or does not run with the land.

1848.
 TULK
 v.
 MOKHAY.
 —
Statement.

tain the said piece or parcel of ground and square garden, and the iron railing round the same, in its present form, and in sufficient and proper repair as a square-garden and pleasure-ground, in an open state, uncovered with any buildings, in a neat and ornamental order; and shall not nor will take down, nor permit or suffer to be taken down or defaced, at any time or times hereafter, the equestrian statue now standing or being in the centre of the said square-garden, but shall and will continue and keep the same in its present situation, as it now is; and, also, that it shall and may be lawful to and for the inhabitants of *Leicester-square* aforesaid, tenants of the said *Charles Augustus Tulk*, and of *John Augustus Tulk*, Esq., his father, their heirs and assigns, as well as the said *Charles Augustus Tulk* and *John Augustus Tulk*, their heirs and assigns, on payment of a reasonable rent for the same, to have keys (at their own expense), and the privilege of admission therewith annually, at any time or times, into the said square-garden and pleasure-ground."

The bill then stated, that the said piece of garden-ground had continued in an open state, and uncovered with any buildings; and that the same had been and continued a garden or pleasure-ground, and planted with trees and shrubs, so as to be an ornament to the square, and a benefit to the inhabitants of the houses there; that the Defendant had become the owner of that piece of ground by virtue of a title derived from *Elms*, and that he had formed a plan, or scheme, for erecting certain lines of shops and buildings thereon; but that the Plaintiff objected to such scheme, as being contrary to the aforesaid covenant, and injurious to the Plaintiff's houses in the square; that the Defendant had, nevertheless, proceeded to cut down several of the trees and shrubs, and had pulled down part of the iron railing, and had erected a hoarding or boards across the said piece of ground.

The bill charged, that, at the time when the Defendant purchased the piece of ground, and also when he took possession thereof, and also when he committed the acts complained of, he had notice of the covenant.

1848.
 TULK
 v.
 MOXHAY.
 —
Statement.

The bill prayed, that the Defendant, and his agents and workmen, might be restrained from cutting down the trees and shrubs on the said piece of garden-ground, and from pulling down or removing the iron railing round the same; and from setting up, or erecting, or continuing on the said piece of garden-ground, any house, shop, or other building, or any scaffolding, hoarding, or boards, for the purpose of building; and from taking down, or permitting or suffering to be taken down or defaced, the said equestrian statue in the centre of the said square-garden, or from doing or committing, or permitting or suffering to be done or committed, any waste, spoil, destruction, or nuisance to be in or upon the said piece of garden-ground.

An *ex parte* injunction was obtained from the *Master of the Rolls*, and the Defendant then put in his answer. He deduced his title as follows:—*Charles Elms* died in 1822, and on his death *Harriet Filewood* came into possession of the piece of land as devisee under his will. She died in 1834, having devised this property to *Robert Barron*, who sold it in the same year to *John Inderwick*, for 400*l.*; and, in 1839, Mr. *Hyams* entered into an agreement to purchase it for 451*l.* The Defendant became entitled to the benefit of that agreement; but no conveyance of it was executed to him until 1848.

The Defendant, by his answer, stated, that the inhabitants of *Leicester-square* and of the Plaintiff's houses had entirely ceased to use this piece of ground as a garden and pleasure-ground, or to pay any sum for the privilege of admission; and that, for many years before the Defendant

1848.
 TULK
 v.
 MOXHAY.
 —
Statement.

purchased it, it had been in a ruinous condition, and not in an ornamental state, but altogether out of repair; that *Tulk* never took any steps to enforce the covenant, or to have the site of the ground improved; that the square was no longer a quiet place of residence, but that a thoroughfare had lately been made through it from *Long Acre* to *Piccadilly*; that he proposed to open two foot-paths diagonally across the square, putting up gates and fences; that he had not yet fixed on any plan for building on it, or as to the ultimate use he should make of it; but he reserved by his answer the right to make all such use of the land as he might thereafter think fit, and lawfully could do; and he also submitted to the Court, that the covenant did not run with the land, and did not bind him as assignee.

The Defendant applied to the *Master of the Rolls* to dissolve the injunction, which his Lordship refused to do, and merely made some variations in the order. The effect of the injunction, as varied, was to restrain the Defendant, his workmen, &c., from converting or using the piece of ground and square-garden in the bill mentioned, and the iron railing round the same, to or for any other purpose than as a square-garden and pleasure-ground, in an open state, uncovered with buildings, until the hearing of this cause, or the further order of this Court.

The motion to dissolve the injunction was now renewed before the *Lord Chancellor*.

Argument.

Mr. *R. Palmer*, in support of the application:—

The Defendant rests his case partly on the change in the character of the property since the conveyance to *Elms*, and partly on the ground that the covenant did not run with the land so as to be binding upon the Defendant;

or that, at all events, this Court ought not to interfere by injunction until the Plaintiff has established his right at law.

The parties to the sale in 1808 intended a certain mutuality ; certain benefits were to be received from the payment of annual sums for the privilege of using the garden ; and as that consideration has entirely failed, and that part of the contract is, in fact, abandoned by the inhabitants, it would be inequitable to compel the Defendant any longer to perform the other part of it. And the advantages of the square as a place of residence are so changed by circumstances, that such a piece of open ground is of little use : *The Duke of Bedford v. The Trustees of the British Museum* (a).

But the chief question is, whether the covenant of *Elms* is binding at law upon the Defendant ; and if not, whether the Defendant will be bound by it in equity. The land might, no doubt, have been secured for the use of the occupiers of the houses in the neighbourhood, if such had been the contract between the parties. Mr. *Tulk* might, if he had thought it necessary, have employed the intervention of trustees, or created a term of years, or conveyed a fee-simple conditional, reserving a right of re-entry, or have secured the same object by other legal means. But he did not do so. The covenant was entered into with him, his heirs, executors, and administrators, and is therefore a covenant with him personally. He thought it sufficient to take a covenant from the purchaser that certain acts should not be done. He chose to rest satisfied with that undertaking and with that security. Why should this Court give him more than he thought proper to stipulate for, or than the purchaser consented to grant ; and extend the liability, so as

1848.
 TULK
 v.
 MOXHAY.
 —
Argument.

(a) 2 My. & K. 552 ; Sugden's Vend. & Purch., Appendix, 1113, 11th edit.

1848.
 TULK
 v.
 MOXHAY.
 —
Argument.

to make it apply, not only to the covenantor, but also to all future owners of the land?

The cases upon the question of law are collected in 1 *Smith's Leading Cases*; and, in a note at page 37, the effect of them is stated thus:—"There appears to be no authority for saying that the *burthen* of a covenant will run with land, in any case except that of landlord and tenant; while the opinion of Lord *Holt* in *Bretoster v. Kidgell* (a), that of Lord *Brougham* in *Keppell v. Bailey* (b), and the reason and convenience of the thing, all militate the other way."

Even if the parties had attempted, by the terms of their covenant, to bind future owners, without creating a reversion in the covenantee, there would be various objections to such a contract. There is no privity of estate between Mr. *Tulk* and the future owners; and it would be a repugnant condition to convey an estate in fee-simple, upon condition that the purchaser should not occupy it or receive the rents, &c. of it. Will, then, a Court of Equity disregard such objections? *Collins v. Plummer* (c), *Whatman v. Gibson* (d), *Schreiber v. Creed* (e), *Mann v. Stephens* (f).

Sir *Edward Sugden*, in his 11th edition of "Vendors and Purchasers" (g), comments upon Lord *Brougham's* observations in *Keppell v. Bailey*, and puts such cases as that on the footing of cases of specific performance. Those observations would apply, if the covenantor had to do some act which would pass an estate to the covenantee. In cases of specific performance, there is a duty to be performed;

(a) 12 Mod. 166; Holt, 175,
 669.
 (b) 2 My. & K. 517.
 (c) 1 P. Wms. 104.

(d) 9 Sim. 196.
 (e) 10 Sim. 9.
 (f) 15 Sim. 377.
 (g) Page 738.

and by the performance of that duty an estate will be created. This Court will, therefore, compel not only the vendor, but a party who claims under him, with notice, to discharge that duty. But in this case nothing remains unperformed; and the covenantee claims more than he ever contracted for.

1848.
TULK
v.
MOXHAY.
—
Argument.

There is no case where there has been a covenant, not to create an estate or interest, but merely that something shall or shall not be done, in which this Court has said that any person is bound in equity who is not bound in law.

It is said that the Defendant had notice of the covenant; but notice cannot create a liability. It informs the party who takes an estate of a liability which already binds it. There is no trust here affecting the estate; after the conveyance was executed, the covenant must be considered as the contract, and not as creating any other liability or trust; and the purchaser takes the estate free from restriction, with a notice that a former owner was personally under a certain obligation.

Mr. *Rolt* and Mr. *Shebbeare* appeared for the Plaintiff, but were not called upon.

The LORD CHANCELLOR:—

Judgment.

I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this Court ever since I have known it. Where the owner of a piece of land enters into a contract with his neighbour, founded, of course, upon valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears

1848.
 TULK
 v.
 MOXHAY.
 —
Judgment.

to me the very foundation of the whole of this jurisdiction, to maintain that this Court has authority to enforce such a contract. It has never, that I know of, been disputed. In the case in the House of Lords of *Heriot's Hospital*, in *Scotland* (a), there was raised this question, and this question only: whether a plan exhibited at the time the conveyance was taken could be considered as part of the contract. There had been some authorities treating it as part of the contract: the Court of Session had so considered it, upon principles not confined to the law of *Scotland*, but equally applicable to the law of both countries. When it came to the House of Lords, that was the only matter which Lord *Eldon* and Lord *Redesdale* had to consider. It never entered into the contemplation of either of those noble Lords, (as far as I recollect, at least, from the report of that case), that there was any question as to the jurisdiction of a court of equity, (equity being administered by the Court of Session in *Scotland*), or that the party might so bind himself. And there is not now any question raised as to that; only it is contended that this Court will not enforce the covenant.

It is not disputed that a party selling land may, by some means or other, provide that the party to whom he sells it shall conform to certain rules, which the parties may think proper to lay down as between themselves. They may so contract as to bind the party purchasing to deal with the land according to the stipulation between him and the vendor. Now, here, there is no question about the contract, because the purchaser of the area of *Leicester Fields* takes it subject to the following stipulation:—[His Lordship then read the covenant.]

Here, then, upon the face of the instrument, and in a

(a) *The Feoffees of Heriot's Hospital v. Gibson*, 2 Dow, 301.

manner free from doubt and requiring no evidence to be supplied *dehors* the instrument, the owner of the houses sells and disposes of land adjoining to those houses with an express covenant on the part of the purchaser, his heirs and assigns, that there shall be no buildings erected upon that land. It is now contended, not that *Elms*, the vendee, could violate that contract—not that he could build immediately after he had covenanted not to build, or that this Court could have had any difficulty, if he had made that attempt, to prevent him from building—but that he might sell that piece of land as if it were not incumbered with that covenant; and that the person to whom he sold it might at once, without the risk of the interference of this Court, violate the covenant of the party from whom he purchased it.

Now, I do not apprehend that the jurisdiction of this Court is fettered by the question, whether the covenant runs with the land or not. The question is, whether a party taking property with a stipulation to use it in a particular manner—that stipulation being imposed on him by the vendor in such a manner as to be binding by the law and principles of this Court—will be permitted by this Court to use it in a way diametrically opposite to that which the party has stipulated for. If that be so, what has become, not only of all those cases before the *Vice-Chancellor*, which have been now referred to, and in which he has considered it as a matter not in dispute, but of the case of the *British Museum*, before Lord *Eldon*? He did not enter into that question; and it does not seem to have been contended before him or before Sir *John Leach* by those who argued it, although Sir *John Leach* took that view of it. As to the arguments before Lord *Eldon*, they have been very shortly reported, and we do not know exactly what passed. But, looking at the ground Lord *Eldon* took,

1848.
 TULK
 v.
 MOXHAY.
 —
Judgment.

1848.
 TULK
 v.
 MOXHAY.
 —
Judgment.

particularly in the case of *Heriot's Hospital*, it must have occurred to his mind, that if such a covenant was found to exist—if such had appeared to be the agreement between the parties—this Court would interpose and protect the vendor against the violation of the covenant which had been entered into. Of course, the party purchasing the property, which is under such restriction, gives less for it than he would have given if he had bought it unincumbered. Can there, then, be anything much more inequitable or contrary to good conscience, than that a party, who takes property at a less price because it is subject to a restriction, should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this Court never would sanction any such course of proceeding; but, on the contrary, it has always acted upon this principle, that you, who have the property, are bound by the principles and law of this Court to submit to the contract you have entered into; and you will not be permitted to hand over that property, and give to your assignee or your vendee a higher title, with regard to interest as between yourself and your vendor, than you yourself possess.

That is quite unconnected with the doctrine of a covenant running with the land. If the Court finds in the instrument itself, not in the shape of a covenant or recital, anything which shews the Court what was the understanding between the parties, the case becomes free from all those difficulties which exist where contracts are attempted to be inferred from the exhibition of a plan. Then you have it upon the face of the instrument itself; nay, a plan attached to the instrument is part of the instrument, and is evidence.

All which the decisions have settled is this, that you cannot go out of the instrument, and by evidence *dehors* the instrument raise a new case by the exhibition of a plan not attached to, and therefore not forming part of, the instrument. If there be a plan attached to the instrument, that plan may be considered as evidence of the contract entered into between the parties. There is no question about the legal liability, which is best proved by this: that if there be a merely legal agreement, and no covenant—no question about the covenant running with the land—the party who takes the land takes it subject to the equity which the owner of the property has created: and if he takes it, subject to that equity, created by those through whom he has derived title to it, is it not the rule of this Court, that the party, who has taken the property with knowledge of the equity, is liable to the equity? Is not this an equity attached to the property, by the party who is competent to bind the property? If a party enters into an agreement for a lease, and then sells the property which was to be demised, the purchaser of that property, with knowledge of the agreement, cannot set up his title against the party claiming the benefit of that contract; because, if there had been an equity attaching to the property in the owner, the owner is not permitted to give a better title to the purchaser with notice than he himself possesses. The other party is entitled to the benefit of the contract, and to have it exercised and carried into effect against the person who is in possession, unless that person can shew he purchased it without notice. Here there is a clear, distinct, and admitted equity in the vendor, as against Mr. *Elms*; and as to the party now sought to be affected by it, it is not in dispute that he took the land with notice of the covenant: indeed, it appears on the face of the instrument which is the foundation of his title. It seems to me to be the simplest case that a Court of Equity ever acted upon, that a

1848.

TULK

v.

MOXHAY.

Judgment.

1848.

TULK

v.

MOXHAY.

Judgment.

purchaser cannot have a better title than the party under whom he claims.

Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present Defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. *Tulk*.

I say nothing of the doctrine supposed to be laid down by Lord *Brougham* (a), because I have not had an opportunity of examining exactly how it stands; therefore, I may not very distinctly understand it. Undoubtedly, it cannot be supposed that Lord *Brougham* intended to lay this down, that this Court would not consider any equity attaching to land in such a manner that this Court would enforce it, except in cases in which it might be enforced at law. It is clear that could not be the intention of Lord *Brougham*, however the opinion he expressed may appear. I say nothing about that, nor do I give any opinion about it: I could not venture to do so without critically examining the expressions attributed to him. But if there be any such, I can only say I do not coincide with that doctrine. I consider the rule of law is not at all the measure for the administration of equity. In short, it would be obvious, if it were so, that there could be no contract interfering with the fee-simple, or the management of it. If a man has, in law, a fee-simple, cannot he in equity contract with it in a way which may be beneficial, or not be injurious, to his neighbour? I cannot understand how that supposed doc-

(a) *Keppell v. Bailey*, 2 My. & K. 517.

trine can exist, co-extensively with the jurisdiction which the Court is in the habit continually of exercising.

I think, therefore, that the *Master of the Rolls* is quite right.

1848.
 TULK
 v.
 MOXHAY.
 —
Judgment.

In the case of *Mann v. Stephens* (a), I do not know whether that point was raised: in all probability it was not. I did not advert to it, according to any note that I have; but it is directly in point, not only so far as my own decision went, but on the case as argued before the *Vice-Chancellor*, and decided by him, and affirmed by me on the only point at all affecting the present question, namely, that those parties—neither of them being parties to the covenant, but both having derivative titles, one under the vendor and one under the vendee—had given effect to the contract between the vendor and vendee to bind those who should claim under them. The party in possession of the land had obtained it from the covenantor, with knowledge of the contract he had entered into. That case could not stand with the present case if this order of the *Master of the Rolls* was wrong. My opinion is, that they are both right, and that this motion must be refused, with costs.

(a) 15 Sim. 377.

1849.

Jan. 11th.

In re THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY, *Ex parte* REAVELY.

Where shares in a Banking Company had been transferred into the name of a minor by his grandmother, but the dividends had been paid to his father, and he had covenanted with the Company for the payment, by the son, of all instalments in respect of those shares, and to indemnify the Company against any loss which might be occasioned to them by reason of the son's minority or of the payment of the dividends, the name of the father was held to have been properly included, in respect of those shares, in the list of "contributories," within the meaning of the Joint-stock Companies Winding-up Act.

AN order had been made, in November, 1848, under the Joint-stock Companies Winding-up Act, 1848, for the dissolution and winding-up of the North of England Joint-stock Banking Company; and it was thereby referred to Master *Farrer* to wind up the affairs of the Company.

In pursuance of that order, official managers were appointed by the Master, who made out a list of the contributories of the Company, in which list they proposed to insert the name of Mr. *Thomas Reavely*, senior, as the owner of sixty-six shares. Notice thereof was given to him under the 78th section of the act, and he appeared before the Master, and insisted that his name ought not to be included. The Master overruled his objection, and retained his name as one of the contributories, within the meaning of the 3rd section of the act.

The facts of the case were as follows:—In October, 1838, five shares in the Banking Company were purchased by Mr. *Reavely's* mother-in-law, for the benefit of her grandson, *Thomas Reavely*, the younger, who was an infant. The shares were transferred to him, and were registered in his name in the books of the Company, and he was returned to the Stamp-office as the owner of them. Subsequently, fifty-one additional shares were also purchased by the grandmother, and transferred in the same manner. The dividends were from time to time received by the father on his son's account. In March, 1842, a deed of covenant was executed by Mr. *Reavely*, the elder, by which he covenanted with the public officer and managing directors of the Bank-

ing Company that *Thomas Reavely*, the younger, should at all times pay all instalments which might be duly required on those fifty-six shares, and also on any other shares of which he should become the proprietor, while under the age of twenty-one years, and keep all covenants in the deed of settlement of the Bank, and all other stipulations affecting holders of shares. He also covenanted to indemnify the public officer, managing and other directors, and the other members of the Company, from all losses which they might incur, by reason of *Thomas Reavely* being under twenty-one, or on account of the dividends already paid or thereafter to be paid to the father, on account of those shares. Ten more shares were afterward purchased by the grandmother, and were also transferred into the name of the grandson: the grandson was still a minor.

1849.

In re
THE NORTH
OF ENGLAND
JOINT-STOCK
BANKING CO.,
Ex parte
REAVELY.
—
Statement.

After the order had been made for winding-up the affairs of the Company, the official managers addressed to the son, and not to the father, a circular, which was sent to the contributories, intimating the hearing of the petition.

The father had moved, before the Vice-Chancellor *Knight Bruce*, to reverse the Master's decision, which his Honor refused; and a motion was now made before the *Lord Chancellor* to discharge his Honor's order.

Mr. *J. Russell* and Mr. *Manisty*, in support of the motion, contended, that the father was only a surety for the payment by the son of such sums as he should be properly called upon to contribute. The son was the contributory, and the father had given security that the son's contributions should be duly paid. The words "otherwise howsoever," which occurred in the interpretation clause of the act, where the meaning of the word "contributory" was

Argument.

1849.

In re
**THE NORTH
 OF ENGLAND
 JOINT-STOCK
 BANKING CO.,**
Es parte
REAVELY.
 —
Argument.

explained (a), must be intended to apply to any way *ejusdem generis* with the other modes which were previously mentioned. The term could not be taken without some limit, otherwise it would include every debtor of the Bank and every one from whom anything might be recovered at law for damages or otherwise, because all such parties would be in some sense liable to contribute. The Bank had treated the son as the contributory, by inserting his name in their register, and returning him as the proprietor; and if he attained twenty-one, and if the Bank had been a successful undertaking, he would have been entitled to all the benefit arising from those shares. The Company had, therefore, entered into a contract with him, which was not void, though it might be voidable; and they must wait till he attained twenty-one, to ascertain whether he repudiated the contract, before the father could come within the meaning of the term “contributory.”

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam* appeared on the other side. But

Judgment.

The LORD CHANCELLOR, without hearing them, said, he was quite satisfied with the decision of the Master and of the Vice-Chancellor *Knight Bruce*, and he must refuse this motion, with costs.

(a) Sect. 3, par. 5.

1849.

In re THE NORTH OF ENGLAND JOINT-STOCK
BANKING COMPANY, *Ex parte* GLAHOLM.

Jan. 18th.

WILLIAM GLAHOLM had executed the original deed of settlement of the North of England Joint-stock Banking Company, which was dated in November, 1832, in respect of twelve shares, and he continued to hold those shares until 1837, when he died. Mr. *Thomas Glaholm*, his brother, then applied to the manager for payment of the dividends on the twelve shares, but produced no probate or letters of administration, stating that that was the only property which his brother had left, and that it was not worth while to administer to his estate. The directors of the Company allowed him to receive the dividends, but the shares were never transferred into his name, nor was his name inserted in the share register-list, or returned to the Stamp-office as proprietor. The receipts were given by him in respect of the dividends on "the paid-up capital stock of the Company in his name," and were signed by him as "representative of the late *William Glaholm*."

In November, 1848, an order was made, under the Joint-stock Companies Winding-up Act, 1848, for winding up the affairs of the Bank, and for its dissolution.

In pursuance of the 78th section, a notice had been sent by the official managers, addressed to "Mr. *Thomas Glaholm*, representative of *William Glaholm*, Miller, Newcastle," stating that they had included him (*Thomas Glaholm*) in the list of contributories in the character and for the number of shares stated below. The number of the shares stated was "twelve," and the character was as "representative of *William Glaholm*." He appeared before the Master, where the official manager proposed to insert his name as a con-

On the death of a shareholder in a Banking Company, the dividends were paid to his brother, the Bank having notice that there was no legal personal representative. A notice was served upon him under the Joint-stock Companies Winding-up Act, that the official manager proposed to insert his name as a contributory in respect of those shares, as the representative of the deceased shareholder:—*Held*, that, under that notice, the Master had no jurisdiction to decide whether he was a contributory without qualification, or in any other character than as mentioned in the notice.

1849.
 In re
 THE NORTH
 OF ENGLAND
 JOINT-STOCK
 BANKING CO.,
Ex parte
 GLAHOLM.
 —
Statement.

tributory, without any qualification. He contended, on the other hand, that he had, in point of fact, no title to those shares, and that, if he was included at all, it ought only to be in a qualified character as a representative: and he raised the preliminary objection, that, as the notice treated him as a representative, the Master ought only to inquire whether he was liable in that character. The Master determined that he ought to be included as a contributory for those shares, without any qualification.

Mr. *Glaholm* moved, before Vice-Chancellor *Knight Bruce*, that that decision might be reversed, and his name struck out; or that, if it should be included at all, his liability ought to be confined to the extent of the assets come to his hands as representative of *William Glaholm*.

The *Vice-Chancellor* was of opinion that the notice was not sufficient to authorise the decision of the Master; and he referred it back to him to review his decision and certificate. A motion was now made before the *Lord Chancellor*, on behalf of the official managers, that his Honor's order might be discharged.

Argument.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam*, in support of the motion, contended, that the Master was right in treating *Thomas Glaholm* as a party who had held himself out as a partner by receiving profits; that it was clear that he was not a representative; and that he could not take advantage of any defect in his title to avoid liabilities, when he had always been willing to accept the benefit of the shares while the concern was successful.

That, as to the notice, it was sufficient to inform *Thomas Glaholm* of the nature of the liability to which it was pro-

posed to subject him; and that the Master had power to make any necessary variations in the list when he came to settle it.

Mr. *J. Russell* and Mr. *Manisty* appeared to oppose the motion.

1849.
In re
THE NORTH
OF ENGLAND
JOINT-STOCK
BANKING CO.,
Ex parte
GLAHOLM.
Argument.

The LORD CHANCELLOR said, that, as the 78th section required the notice to state the character in which a party was to be included in the list, and this notice had complied with that direction the Master's duty was, to come to a decision whether this party was liable as a contributory in that character; and when he had done that, his duty and his jurisdiction were ended. But it appeared that *Glaholm* was not liable in the character which was specified in the notice; and, therefore, the 78th section would be practically superseded if the Master were to be at liberty to fix him with liability in any other character. He thought the decision of the *Vice-Chancellor* was right; and he must refuse this motion, with costs, to be paid to Mr. *Glaholm* by the official managers.

Judgment.

In re LEWES.

THIS was a petition by the mortgagor, under the 1 Will. IV, c. 60.

Jan. 26th.

Some hereditaments were mortgaged in fee to *Lewes*, and in the mortgage-deed it was stated that *Lewes* was a trustee of the money advanced.

Where a mortgage in fee had been executed with knowledge that the mortgagee was a trustee only of the money advanced, and the mortgagee became lunatic, all such extra costs of procuring a re-conveyance as were occasioned by the lunacy were thrown upon the mortgagor, and were not payable either by the lunatic or by the parties beneficially interested in the mortgage-money.

In 1847, *Lewes* was found lunatic by inquisition; and conveyance as were occasioned by the lunacy were thrown upon the mortgagor, and were not payable either by the lunatic or by the parties beneficially interested in the mortgage-money.

1849.
 {
In re
 LEWES.
 —
Statement.

the mortgagor, being afterward desirous of paying off the mortgage, presented this petition, praying that the Committee might be appointed to receive the mortgage-money, and be directed to execute a re-conveyance.

The only question was, whether the mortgagor or the parties who were beneficially interested in the mortgage-money ought to pay the costs of the petition and of the other proceedings which were rendered necessary by the lunacy.

Argument.

Mr. *W. M. James* appeared for the Petitioner ;

Mr. *R. W. Moore*, for the parties beneficially interested in the mortgage-money ; and

Mr. *White*, for the Committee.

Ex parte Richards (a), where the extra costs, occasioned by the lunacy, were thrown upon the lunatic's estate ; *Ex parte Marrow* (b), where that decision was in some degree impugned ; *In re Townsend* (c) ; *Ex parte Clay* (d) ; and *King v. Smith* (e), were cited.

Judgment.

The LORD CHANCELLOR said, he thought the cases before Lord *Lyndhurst*, and referred to by Mr. *Shelford*, must govern this case, and that the costs must be paid by the mortgagor. He executed the mortgage with knowledge that the mortgagee was only a trustee, and the loss occasioned by the lunacy must fall upon him.

(a) 1 J. & W. 264.

(b) Cr. & Ph. 142.

(c) 2 Ph. 348.

(d) Shelford on Lunacy, 393 ;
and see p. 392.

(e) 6 Hare, 473.

1849.

In re THE WHEAL LOVELL MINING COMPANY, *Ex parte* WYLD.

Jan. 26th & 29th.

A MOTION was made, on behalf of the Wheal Lovell Mining Company, to discharge an order made by the Vice-Chancellor *Knight Bruce*, under the Joint-stock Companies Winding-up Act, 1848.

A Mining Company, on the "cost-book" system, formed before the passing of the Joint-stock Companies Winding-up Act, is not within its operation.

A petition had been presented by *James Wyld*, Esq., in the matter of the Wheal Lovell Mining Company, to obtain a dissolution of the Company, under the Joint-stock Companies Winding-up Act, 1848.

If the tests which are directed by the act to be applied to try the solvency of a company, strictly and literally apply to a particular Company, but the presumption arising therefrom is rebutted by the evidence offered in opposition to the petition, so that there is no reason to believe that the Company is insolvent, the Court will refuse to interfere.

From the statements in the petition it appeared, that, in 1845, an association was formed for the working of certain tin mines, in the parish of *Wendron*, in the county of *Cornwall*, called "The Wheal Lovell Mining Company." It was divided into 500 shares, of 25*l.* each, and was carried on upon the principle known as the "cost-book" system. The Petitioner subscribed his name for five shares in the Company, and paid 25*l.* for calls thereon. It appeared from the balance-sheets, which had been made out by the manager, that the expenditure of the Association had exceeded the receipts, and the Petitioner declined to pay more monies upon his shares, and was desirous of retiring from the Association. The other shareholders, however, objected to his

A dispute having arisen

between a Mining Company and one of the shareholders, respecting his liability to pay calls, the Company procured one of their creditors to bring an action against him. He served notice of the action on the Company, but they took no steps to stay the action or indemnify the shareholder. There were no circumstances to satisfy the Court that the Company was not in a solvent condition:—*Held*, that, although the case came within the letter of the 5th article of the 5th section of the act, yet, as the action arose out of the dispute between the shareholder and the Company, and not from their inability to pay, he was not entitled, under the circumstances, to an order for winding up the concern.

The 2nd section of the Joint-stock Companies Winding-up Act is not intended to extend the operation of the act to all Mining Companies; but it merely declares that such Companies as would have been within the provisions of the act under the 1st section, if they had been established for any other purpose, are not to be excluded merely because they are Mining Companies, *semble*.

1849.
 In re
 THE WHEAL
 LOVELL
 MINING Co.,
Ex parte
 WYLD.
 —
Statement.

withdrawing, until he had paid an additional sum of money to the Association; and, at the instigation of the manager, an action was brought against him, in the Court of Exchequer, for the sum of 161*l.* 2*s.* 8*d.*, for a debt alleged to be due from the Mining Company for machinery. The Petitioner thereupon, on the 30th of October, 1848, served a notice upon the purser or secretary of the Association, under the 5th article of the 5th section of the act, stating that, unless the debt and costs were paid, or secured, within ten days, he should present a petition for the dissolution and winding-up of the affairs of the Association. The Association neglected to make such payment; and a petition was then presented, praying that the Wheal Lovell Mining Company might be ordered to be dissolved and wound up, either forthwith or conditionally, on the non-fulfilment of such terms, and by such parties as the Court should think fit; or that it might be referred to the Master to make preliminary inquiries as to the necessity or expediency of the dissolution and winding-up of the Company.

Several calls had been made, in respect of which a sum of 115*l.* was due from Mr. *Wyld*, on account of his shares.

The cost of the purchase of the mine was stated to have been 11,200*l.* The proceeds of the mine were stated to have paid for the purchase, and the expenses of working, except about 1400*l.*; and their machinery was stated to be worth 6000*l.*

The order made by the Vice-Chancellor *Knight Bruce* directed that the Petitioner was to be at liberty to pay to the Plaintiffs in the action at law their debt and taxed costs, without prejudice to any question; and that *William Carne*, the purser of the Company, should, within ten days after notice of such payment and of the amount paid,

and also of the amount of the Petitioner's costs in the said action, should have been left at the counting-house of the Company, be at liberty to pay to him the amount of the said debt and costs, after deducting therefrom the sum of 115*l.*, the amount due from him in respect of the calls; and that the same be received and paid without prejudice to any question between the parties; and that, in case such payment be not made by the Company within the time aforesaid, the affairs of the said Company ought to be wound up, and the said Company dissolved; and in either case, whether such payment be made, or in default of such payment, that the Petitioner be at liberty to bring on the said petition again for hearing, as he might be advised.

1849.

In re
THE WHEAL
LOVELL
MINING CO.,
Ex parte
WYLD.

Statement.

Mr. *Rolt* and Mr. *Follett*, in support of the motion:—

Argument.

The first point is, whether this Company can, in any case, be brought within the operation of the act. If it can, the next point is, whether the circumstances which have occurred render it a fit case for the act to be applied to it. The 1st section enacts, that the act shall apply to Companies which are within the 7 & 8 Vict. cc. 110 & 111, and to Companies formed after the passing of the Winding-up Act. But mining Companies worked on the "cost-book" principle were expressly excluded from the operation of the 7 & 8 Vict. c. 110, by the 63rd section; and this Company was formed before the passing of the Winding-up Act. It is not, therefore, brought within the operation of the Winding-up Act by anything contained in the 1st section.

The 2nd section directs, that all Companies formed for the purpose of working mines shall be within the operation of the act; that is to say, that a Company which would come within the description contained in the 1st section, if it were formed for any other purpose, shall not be excluded

1849.

In re
THE WHEAL
LOVELL
MINING CO.,
Ex parte
WYLD.

Argument.

from it merely because it is a mining company ; but it was not intended that a mining company should, merely because it was formed for that specific object, come within the operation of the act, unless it answered the description contained in the 1st section. The effect of the 2nd section is, to declare that the act may include mining companies formed after the passing of the act, but not to declare that it is to include mining companies which existed when the act was passed.

But if this Company could, in any case, be brought within the operation of the act, there are not any circumstances in this case which render it proper that the Company should be wound up. It possesses property to a considerable amount; it is not insolvent, and it is still carrying on business. The action is brought, not because the Company are unable to pay their debts, but because there is a contest between one shareholder and the manager of the Company ; and this is merely an attempt to drive them to a compromise, by a threat to dissolve them under the Winding-up Act. The Court has no ground whatever for considering the condition of this Company as being other than prosperous and successful.

Mr. *Bacon* and Mr. *J. H. Palmer*, for the Petitioner:—

The language of the 2nd section is so extensive, that any company formed for the purpose of working mines must be within the operation of the act.

[The LORD CHANCELLOR.—Would a partnership of two persons be within the act?]

If one of two partners in a mining concern filed a bill for a dissolution of the partnership, it is clear, that, under the 18th section, the machinery of the act may be applied to such a partnership ; and, therefore, there can be nothing

unreasonable in supposing that it was the intention of the Legislature that the interference of the Court might be obtained, even in a case of two partners, without the expense or delay of a suit, but merely by a petition under the act.

1849.

In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Argument.

The circumstances of this case bring it precisely within the letter of the 5th article of the 5th section. An action has been brought against a member of the Company for a debt due from the Company, which debt the Company, after having notice, has not paid or secured, nor has any indemnity been given to the Petitioner against such action. If, however, in such a case, the Court should not think it right to order that the affairs of the Company should be dissolved, then the present order appears to be precisely such as was contemplated by the 12th section, which authorised the Court to make an order for the dissolution of a Company conditionally, on the non-fulfilment of such terms as the Court might think fit.

Mr. *Rolt* replied upon the first point only—namely, the construction of the act.

The LORD CHANCELLOR:—

Jan. 29th.

Judgment.

The Company or co-partnership in question is a mining association, which, however, had existence before the passing of the 11 & 12 Vict. c. 45, and, consequently, under the 1st section, would not be included among the Companies affected by the act. The 1st section of the act brings all the Companies affected by certain recited acts of Parliament within its operation; and then comes this general description: “All companies, associations, and partnerships, to be formed after the passing of this act, whereof the capital or the profits is or are divided or to be divided into

VOL. I.

K

L. C.

1849.

In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Judgment.

shares, and such shares transferable without the express consent of all the co-partners." The Company in question, therefore, would not be within the act, unless the 2nd section includes it.

Now, the 2nd section is in these words: "And be it enacted, that all associations or companies formed for the purposes of working mines or minerals, and all benefit building societies, other than such as are duly certified and enrolled under the statutes in force respecting such societies, shall be liable to the operation of this act." It is contended, that that section brings all companies and all partnerships for mining purposes, whether they answer the description in the 1st clause or not, within what is called the operation of the act; and the question which I have to consider is, whether that is the right construction of the 2nd clause, or whether, as it is contended for on the other hand, it is merely a mode adopted by the Legislature of declaring that such associations are to be considered as among the enumerated associations to be operated upon by the act.

In the first place, take the very words of the act, without reference to the consequences that might follow from one construction or the other. The 1st section describes the sort of companies which are to be the subjects of the act. It therefore describes certain companies which were within the operation of prior acts, particularly the 7 & 8 Vict. cc. 110 and 111; and then it uses those general words, confining the operation of the act, as might be expected, to such companies as should be formed after the passing of the act. One construction, therefore, contended for is simply this, that the 2nd clause is merely an addition to the description of the companies to be affected by the act. The other construction is, that all companies and all partnerships, within one description or another, provided they relate to mining, are to be within the operation of the act.

Now, in the first place, taking the words by themselves, without any reference to the consequences that might follow from one construction or the other, it seems to me much more consistent with the terms of the clause to say, that this 2nd clause (singularly framed, undoubtedly, as it is, but being, I think, capable of explanation, by reference to a former act,) is merely a declaration, that mining companies are to be within the operation of the act; and, if that be the meaning, it is not material in what words that is expressed. But what are the very words used? They are, "all associations or companies formed for the purposes of working mines shall be liable to the operation of this act." Now, as to the operation of the act, those who contend in favour of the large construction of this clause, namely, that it must include all companies, would leave out the 1st clause altogether. Such construction would leave all the subsequent clauses to operate on the Company in question; but it would exclude the 1st clause. The 1st clause is a most important part of the act, because it describes the companies on which the act is to operate. It enumerates some by description, and gives a general description of others. That being the subject-matter on which the act is to operate, the other provisions are directory, and make certain arrangements for the purpose of carrying the object of the act into effect.

1849.
In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Judgment.

It may be naturally said, it is singular that, the 1st clause professing to enumerate and describe the companies which are the subject of the act, the act should, by a second independent clause, enumerate and describe other companies, and say all such companies shall be under its operation; and if there be nothing in the prior act to explain that, it would have been a difficult matter to speculate on what it was that gave rise to that mode of describing the companies that were to be operated on by the act. But, by reference to the former act, (the 7 & 8 Vict. c. 110), which directed

1849.

In re
THE WHEAL
LOVELL
MINING CO.,
Ex parte
WYLD.

Judgment.

registration of companies, as the next chapter furnished the means by which those companies were to be wound up, we find that that act excludes banking companies; and these, although they are not the subject-matter of the present act, are all material to be considered in putting a construction upon the terms in question. It excludes banking companies and benefit building societies, which are duly inrolled under their own acts; and then, by a totally distinct and independent clause, namely, the 63rd clause, it excludes from the operation of that act partnerships for working mines on the "cost-book" principle; and it excludes, generally all joint-stock companies which had been formed before the 1st of November, 1844. So that the act for the registration of these companies, by a distinct clause, which stands in a different part of the act from the clause containing the description of companies to be operated on by the act, excludes mining companies of a particular description—that is, mining companies carried on under the "cost-book" principle. Such mining companies were not operated on by the act of the 7 & 8 Vict. c. 110, nor were banking companies. There is another description of company on which it is not very easy to understand how these two acts were intended to operate, namely, benefit building societies generally, as distinguished from benefit building societies duly inrolled under their particular acts. Those are the subjects of exception in the 7 & 8 Vict. c. 110.

Then comes this act, which proposes to make alterations in that respect, and to include in this act and bring under its operation certain companies which were excluded from the operation of the prior act of the 7 & 8 Vict. c. 110; and for that purpose, and in the 1st clause, after providing that this act shall apply to all companies affected by prior acts, which would not include either banking companies or mining companies, because they are expressly excepted, it says, "And to all banking companies which would have been within the

provisions" of the former act, if they had not been specially excepted from the provisions of the act of the 7 & 8 Vict. c. 110; so that, with regard to banking companies, which are excepted out of the first act by a distinct exception among the enumeration of the companies to be affected by it, those it includes, by distinctly declaring that it shall apply to all banking companies which would have been within the prior act if they had not been specially excluded. That is the mode in which it gets rid of the exception as to banking companies. But the former act also excepted those benefit building societies which were not duly inrolled according to their particular acts; and why this act dealt with that description of company, together with a mining company, in the 2nd section, does not very clearly appear. But the 2nd section does deal with that description of company; and, inasmuch as the 7 & 8 Vict. c. 110, dealt with mining companies by a separate clause, it appears to have been thought more consistent with the former act, or safer, to deal in this act also with those companies under a separate clause. And then we find, as the 63rd section of the first act deals with mining companies, the 2nd section of this act also deals with mining companies. This act, therefore, having, by distinct enumeration in the 1st section, got rid of the exception as to banking companies, in the 2nd section it declares that mining companies and this description of building societies shall also be within the operation of the act.

It appears to me that this goes a great way to explain, what otherwise would not be very explicable, why it was that a distinct clause, finding its position in the act as it does here, was introduced into it; and goes a great way to shew that the act intended to deal with those mining companies as it had clearly intended to deal with the banking companies, namely, to remove the exception which had been introduced into the act of the 7 & 8 Vict. That would make the whole perfectly consistent, and would be

1849.

In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
D.

Judgment.

1849.
In re
THE WHEAL
LOVELL
MINING CO.,
Ex parte
WYLD.

Judgment.

the same thing as if, in the 1st section of this act, it had dealt with these mining companies as it has dealt with the banking companies, and therefore treated them as coming within the enumeration of companies which are under the operation of the act. What would be the effect of the other construction? It would be this—that, having excluded all mining companies carried on under the “cost-book” principle from the operation of the first act, by this act it would include all, not only all companies, whether the shares were transferable or not, but every partnership where there was more than one partner engaged: whether it had existed for a great number of years, or was a new company, it would include them all. And this was necessarily the argument on that construction of the act: anything more preposterous than that could not be conceived. There is nothing to confine or to restrict the operation of the act, if it applies to all mining companies. Suppose an old mining company, carried on by two proprietors jointly, or any number of parties, whether on the “cost-book” principle or not, or with shares transferable or not transferable—the fact that it is a mining company is made the test that this act was at once to operate on it. That would be a total departure from all the scheme of this act and the former act, and would be putting this association on a footing which is totally inapplicable, under this act, to any other company. But, if the words are such as are not capable of being dealt with in any other way, whatever error might have been committed, one would be bound to give effect to them; but it is a construction that one would certainly be very slow and very unwilling to put, although one might be compelled by the words to adopt that particular construction: but nobody can doubt that it would be acting contrary to the real intention of the act, although that intention may not have been sufficiently expressed.

But then would that construction be consistent with the words used? Would that be putting the companies under

1849.

In re
THE WHEAL
LOVELL
MINING CO.,
Ex parte
WYLD.

Judgment.

the operation of the act? The operation of the act is to apply to companies of a certain description—new companies, companies formed after the passing of the act, or other companies, which are to be ascertained with reference to the acts recited. This is not within the act recited, and is not a new company; therefore, it would be a company excluded, or rather not included, within the description of the 1st section, which declares what companies are within it. It would be a forced construction to put on the 2nd clause, for the sole purpose of doing that which it is impossible to suppose the Legislature intended, namely, of operating on all companies, without any restriction or discretion, whether they existed for any length of time, or were carried on upon one principle or another. It appears to me, that that is not only not the obvious intention of the Legislature, but that the words used would be much more consistent—perhaps not so happily expressed as one could wish—with the principle and the obvious meaning of the act, if we were to adopt this construction, namely, that the 2nd clause merely meant to add to the description of the companies which were intended to be described by the 1st clause.

Upon the construction of the act, therefore, if it had stood there alone, I certainly should think much the safest construction would be, to come to the conclusion which I have now expressed; but I confess that, if this Company had been within the provision of the act, I could not have given effect to the order of the *Vice-Chancellor* in this case. The act goes on professing to deal with companies unable to meet their pecuniary engagements; not only have we that as the title of the act, but it is obvious from the whole structure of the act, and from the injuries intended to be remedied, that it was not intended to deal with companies which were solvent and carrying on their business, and which might be prosperous, or, at least, could not come

1849.

In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Judgment.

within the description of companies “unable to meet their pecuniary engagements.” The act contains provisions for furnishing the means, in the event of the companies failing to answer the purpose for which they were created, to facilitate the recovery of debts owing to those who had debts due from such companies, and to do justice between shareholders, some of whom might be called upon to pay the obligations of the company beyond their share of the responsibilities. One object of this act and of the former act was to afford some *test* by which it should be ascertained whether the company did or did not fall within the description of a company unable to meet their pecuniary engagements—in short, a sort of act of bankruptcy of the company. The former act dealt with it as an act of bankruptcy, called it an act of bankruptcy, and provided certain tests. The same identical tests that are applied to traders as evidence of their insolvency are applied as tests to the companies ; and, in the event of the test being applied, and the company not being able to remove that test, the Act considers that as an act of bankruptcy in effect, and, therefore, subjects the company to the operation of the provisions for winding up the concern. But all those tests are simply for the purpose of coming to a safer conclusion as to whether they do or do not fall within the description of companies whose affairs require winding up, and as to which, therefore, the policy of the act was intended to apply.

Now, among others, the test is proposed, of a creditor of the company having a judgment against the company, demanding payment against the company, and the company not paying it, after a certain length of time giving the company the opportunity of paying the judgment-debt if they please ; but if they do not pay that debt so ascertained to be a lawful debt by the judgment, it is assumed they cannot. That is assumed as a very fair test under the circumstances to which the act was intended to apply. But,

following that, another provision is necessarily and properly introduced. If a creditor thinks proper to sue an individual shareholder, and recover a judgment, or shall be in the course of recovering his judgment, against that individual shareholder, the shareholder being so called upon to pay, or liable to pay more than he ought to pay, is then authorised to apply to the company to relieve him from this liability; and if the company do not within a certain time relieve him from the liability, that is also considered as a test of the condition of the company, and of its being in a condition to require the winding up of their affairs, namely, that they are not in a position to meet their pecuniary engagements.

If, however, these circumstances occur where the tests do not at all prove the point under investigation—if these facts occur, but afford no proof of the insolvency of the company or their being unable to meet their pecuniary engagements, why the act loses the test which was intended to be applied; and then the question is, whether the Court, exercising a discretion—for so ample a discretion is given to the Court when all these facts concur—would be right in exercising its discretion, and putting the act in operation upon such a test, the circumstances not coming up to that which is required to be proved, before the company ought to be subjected to the operation of the act.

Now, then, what are the facts here, and do they prove what the act intended should be established by that test, before the discretion of the Court should be exercised, for the purpose of bringing them within the operation of the act? Why, here is a quarrel between a shareholder and the Company. The shareholder having bought certain shares, and having—whether for a good reason or a bad reason is quite immaterial, but having, for some reason or other,—declined to pay the future calls, the Company says, “You must pay

1849.

In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Judgment.

1849.
 In re
 THE WHEAL
 LOVELL
 MINING CO.,
Ex parte
 WYLD.
 —
Argument.

from it merely because it is a mining company ; but it was not intended that a mining company should, merely because it was formed for that specific object, come within the operation of the act, unless it answered the description contained in the 1st section. The effect of the 2nd section is, to declare that the act may include mining companies formed after the passing of the act, but not to declare that it is to include mining companies which existed when the act was passed.

But if this Company could, in any case, be brought within the operation of the act, there are not any circumstances in this case which render it proper that the Company should be wound up. It possesses property to a considerable amount; it is not insolvent, and it is still carrying on business. The action is brought, not because the Company are unable to pay their debts, but because there is a contest between one shareholder and the manager of the Company ; and this is merely an attempt to drive them to a compromise, by a threat to dissolve them under the Winding-up Act. The Court has no ground whatever for considering the condition of this Company as being other than prosperous and successful.

Mr. *Bacon* and Mr. *J. H. Palmer*, for the Petitioner :—

The language of the 2nd section is so extensive, that any company formed for the purpose of working mines must be within the operation of the act.

[The LORD CHANCELLOR.—Would a partnership of two persons be within the act?]

If one of two partners in a mining concern filed a bill for a dissolution of the partnership, it is clear, that, under the 18th section, the machinery of the act may be applied to such a partnership ; and, therefore, there can be nothing

unreasonable in supposing that it was the intention of the Legislature that the interference of the Court might be obtained, even in a case of two partners, without the expense or delay of a suit, but merely by a petition under the act.

1849.
In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Argument.

The circumstances of this case bring it precisely within the letter of the 5th article of the 5th section. An action has been brought against a member of the Company for a debt due from the Company, which debt the Company, after having notice, has not paid or secured, nor has any indemnity been given to the Petitioner against such action. If, however, in such a case, the Court should not think it right to order that the affairs of the Company should be dissolved, then the present order appears to be precisely such as was contemplated by the 12th section, which authorised the Court to make an order for the dissolution of a Company conditionally, on the non-fulfilment of such terms as the Court might think fit.

Mr. *Rolt* replied upon the first point only—namely, the construction of the act.

The LORD CHANCELLOR:—

Jan. 29th.

Judgment.

The Company or co-partnership in question is a mining association, which, however, had existence before the passing of the 11 & 12 Vict. c. 45, and, consequently, under the 1st section, would not be included among the Companies affected by the act. The 1st section of the act brings all the Companies affected by certain recited acts of Parliament within its operation; and then comes this general description: “All companies, associations, and partnerships, to be formed after the passing of this act, whereof the capital or the profits is or are divided or to be divided into

1849.

In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Judgment.

conclusion as to the affairs of the Company, from what is stated by the purser of the Company. There are things stated in the affidavit not satisfactory, and it does not appear very distinctly what the result would be of the figures stated in that affidavit; but I find no test of insolvency. If I believe the purser's affidavit, there certainly is not only no insolvency, but there is a state of things promising success for the future. Their not having paid a dividend on the new adventure in the mine is no proof that the affairs of the Company are not prosperous. We know that the first expenditure may be very large, and, till that expenditure begins to produce its fruits, it can hardly be expected that a dividend should be paid among the shareholders. But the affidavit states, that the property has increased to more than the obligations they owe, and this affidavit would shew a flourishing condition. But what I am to look to is, not whether this affidavit shews a flourishing condition of the affairs of the Company, but whether there is any evidence before me of their being in such a state as, under the provisions of the act, requires a winding-up. I do not find that test which the act requires; it is inconclusive under existing circumstances, and I do not find there is any satisfactory conclusion that it is so from any other circumstances stated.

Being of opinion that the 2nd clause has not the construction contended for by the petitioner, the other matter does not arise; but there being two grounds, either of which would be sufficient foundation for the order I make, I thought it right for the parties to be aware, that, on both grounds, I am of opinion this is not a case in which it is right to make any order; and I cannot but think it is an error to use this act for the purpose of settling controverted points between the shareholders and the Company. It was not intended for that purpose at all. The order uses it for that purpose,

and decides that there is to be a set-off, and makes arrangements to settle the disputes between the shareholder and the Company. There is no such object in the act; the object was on behalf of all creditors and shareholders, if a case appeared which would make it expedient that the affairs of the Company should be wound up, to make arrangements for that purpose. That was the object of the statute; and to apply the machinery of this statute for the purpose of settling disputes about calls, or shares, or payments by the shareholders of the Company, appears to be a matter totally and entirely collateral to the object of the act—foreign from the purposes of the act—and one, therefore, which the Court would not use the machinery of the act for the purpose of carrying into effect. I think, therefore, the order of the *Vice-Chancellor* must be discharged, and the petition before him dismissed.

With regard to the costs, his Lordship said, that he had decided this case on the construction of the statute; but, at the same time, being of opinion that if the construction of the act had been such as the Petitioner contended for, he had not a case, in point of circumstances, entitling him to come to the Court, he was bound to dismiss the petition, with costs.

1849.

In re
THE WHEAL
LOVELL
MINING Co.,
Ex parte
WYLD.

Judgment.

1849.

Jan. 17th &
18th.

A testator gave certain portions of his real and personal estate to trustees for payment of his debts; and he specifically gave several portions of his real and personal estate to different parties "freed from his debts;" and also bequeathed his residuary personal estate "freed from his debts." One of the devised estates was subject to a mortgage. The funds primarily applicable being insufficient to discharge all the debts, the property which passed under the residuary clause was held to be the next fund which ought to be resorted to for that purpose; and the devisee of the mortgaged estate was declared to be entitled to have the mortgage paid off out of the residuary estate.

LORD BROOKE v. THE EARL OF WARWICK.

FREDERICK JOHN, Lord *Monson*, by his will, dated the 5th of August, 1841, appointed and devised, "freed and discharged from all his debts, and all annuities, legacies, and bequests," the manors of *Gatton* and *Linkfield*, and all other his freehold estates in *Surrey*, for the benefit of his mother, the Countess of *Warwick*, for her life, with remainders over for the benefit of the present Lord *Monson* and his issue; and he gave and devised all his copyhold estates in the county of *Surrey*, upon such trusts as would best correspond with the uses and trusts thereby declared of his freehold estates in that county; and he gave and bequeathed, "freed and discharged from all his debts, annuities, legacies, and other charges effected by him," certain leasehold tenements in *Surrey*, and all his household furniture, &c. in his house at *Gatton*, or upon any part of his *Surrey* estates, upon such trusts as would best correspond with the uses and trusts of his freehold estates in *Surrey*; and he gave and bequeathed, "freed and discharged as aforesaid," certain family jewels, upon trust for the Countess of *Warwick*, for her life, and then upon the same trusts as were therein declared by him concerning his household furniture at his house at *Burton*, in *Lincolnshire*; and he gave and bequeathed, "freed and discharged as aforesaid," all his household furniture, &c. at *Burton*, and some family plate, upon such trusts as would best correspond with the uses declared by his father's will concerning the freehold estates thereby devised, comprising the mansion-house at *Burton*, and other property; and the testator appointed and devised all his *Lincolnshire* estates, which were at his own disposition, to trustees, upon trust to sell; and, after providing for the due payment of an annuity to

1849.

LORD BROOKE

v.
THE EARL OF
WARWICK.

Statement.

the Countess of *Warwick*, during her life, upon trust, in the next place, to pay and apply the monies arising from such sale in satisfaction of all debts, whether secured by mortgage, judgment, or otherwise, which, at his decease, might be charged upon all or any of his freehold or copyhold estates in *Surrey*; and, in the next place, to pay off all his other debts, and his funeral and testamentary expenses, and the annuities and pecuniary legacies given by his will, together with the legacy duties; and to stand possessed of the surplus (if any), upon the trusts therein mentioned; and he directed, that, until the sale of the *Lincolnshire* estates, the trustees should hold them, upon proper trusts, for indemnifying his freehold and copyhold estates in *Surrey* from all incumbrances which might be charged thereon at the time of his decease; it being his intention that the said *Surrey* estates should be held and enjoyed, freed and discharged from all incumbrances whatsoever effected by him; and the testator gave and bequeathed all his debts, secured by mortgage, warrant of attorney, bond, or other specialty, arrears of rent, and cash at his bankers', to trustees, upon trust to apply the same in payment of his funeral and testamentary expenses, and his simple contract debts; and, subject thereto, upon the same trusts as the monies to arise from the sale of his *Lincolnshire* estates. The testator then gave divers annuities and pecuniary legacies; and he lastly gave and bequeathed, "freed and discharged from all his debts and liabilities, and the legacies thereinbefore bequeathed, and the duties payable on those legacies and annuities," all the rest and residue of his personal estate to the Plaintiff, Lord *Brooke*, for his own benefit.

The testator died in October, 1841, and this suit was instituted for the administration of his estate. The bill prayed (among other things), that, if the funds provided by the will for payment of the testator's debts should be

1849.
LORD BROOKE
v.
THE EARL OF
WARWICK.
—
Statement.

insufficient, then the copyhold estates in *Surrey* might be first applied in aid of the deficiency ; and that the freehold estates in *Surrey* might be declared not to be entitled to be exonerated from the charges thereon, by the application of any part of the testator's real or personal estate, except such as was expressly given for that purpose.

The Master, to whom the cause was referred, made his report in February, 1848 ; and he thereby found that the real and personal estate, which the testator had directed to be applied in payment of his debts, legacies, and annuities, were deficient for the payment of his debts alone ; and that the *Surrey* estates were still subject to incumbrances to a considerable extent, although part of them had been paid off, in manner directed by the will, by monies arising from the sale of the *Lincolnshire* estates, and from the personal estate appropriated by the testator for this purpose.

The cause came on to be heard before Vice-Chancellor *Knight Bruce*, for further directions, in July, 1848 ; and, by the order then made, it was (among other things) declared, that, after such parts of the testator's personal estate as were included in the bequest of "debts secured by mortgage," &c., and the monies arising from the sale of the *Lincolnshire* estates had been exhausted, the residue, which had been bequeathed to the Plaintiff, was next to be applied in discharging the mortgage debt still due on the *Surrey* estates ; and it was ordered, that so much of the mortgage debt as might not be discharged by those means should remain a charge on those estates.

The Plaintiff was dissatisfied with this order, and presented a petition of appeal, submitting, that so much of the mortgage debt as could not be discharged by means of the property comprised in the bequest of "debts secured by

mortgage," &c., and of the monies arising from the sale of the *Lincolnshire* estates, ought to remain charged on the *Surrey* estates; and that the Plaintiff was entitled to the residue, freed and discharged from those liabilities.

1849.
 LORD BROOKE
 v.
 THE EARL OF
 WARWICK.
 ———
Statement.

Mr. *Bacon* and Mr. *Shadwell* appeared for the Appellant; Mr. *J. Parker* and Mr. *Greene*, for Lord *Monson* and his children; Mr. *Koe* and Mr. *De Gex*, for Lady *Warwick* and others.

Argument.

In support of the appeal it was contended, that the Court would endeavour to give effect to the intention of a testator: and that this testator evidently intended this residue to be freed from debts, equally with any of the specific bequests; and that the residuary gift was, in fact, tantamount to a specific gift of the articles of which the residue consisted: that it was the testator's intention that the *Gatton* estate should be exonerated merely so far as the specified portion of his property, which was devoted to that purpose, would extend: and that, if that was not the intention of the testator, all the specific gifts ought to contribute proportionally to discharge the debt.

On the other hand, it was contended, that, if the directions of the testator were literally complied with, his debts would remain unpaid, and the effect of the will would be the same as if he had directed that none of his property, except a particular portion, should be subject to his debts: that any such attempt would of course be inoperative, and the direction would be set aside: and then the order in which the different portions of the testator's property would be applied in payment of his debts, on the failure of the fund specially devoted to that purpose, would be regulated by the ordinary rules which a Court of Equity adopted in administering a

1849.
 LORD BROOKE
 v.
 THE EARL OF
 WARWICK.
 —
Argument.

testator's estate; and that, therefore, the residuary estate was the proper fund to be resorted to in the first instance: and that, if it was the intention of the testator that the *Gatton* estate should only be exonerated from debts, so far as the specified portion of his property was sufficient to exonerate it, the same construction would apply to all the other gifts which were to be freed from debts; and in that case the direction would be altogether rejected, and the residuary property would be liable. [*Oneal v. Mead* (a), *Galton v. Hancock* (b), and *Lutkins v. Leigh* (c), were cited.]

Jan. 18th.
 —
Judgment.

THE LORD CHANCELLOR:—

In this case the question is, what construction is to be put on the will, to meet the event which has happened—an event which was not contemplated by the testator, and therefore it cannot be expected that any provision should be found in the will applicable to it. The testator having various properties in different parts of *England*, and particularly at *Gatton*, in *Surrey*, disposes of his property at *Gatton*, discharged from his debts, and particularly from a mortgage debt which affected that property. He then devotes other property in *Lincolnshire* to be sold for the purpose of paying his debts, and to exonerate his other estates from the charges to which they might be liable: and in another part of the will he gives a particular portion of his personal property in aid of the fund arising from the sale of the *Lincolnshire* estate. Assuming that what he had so devoted would be sufficient for the payment of his debts, he disposes of particular parts of his property discharged from his debts; and then gives the rest and residue of his pro-

(a) 1 P. Wms. 693.

(b) 2 Atk. 424, 430.

(c) Cas. temp. Talbot, 53.

perty, also discharged from his debts. [His Lordship read the residuary bequest.] It turns out that the property specifically devoted to the payment of debts is inadequate for that purpose, and leaves a portion of the mortgage debt still remaining as a charge on the *Gatton* estate. The decision of the *Vice-Chancellor* is, that what is called *residue*—that is, that part of the property which would have passed under the residuary clause—is liable to be applied to exonerate the *Gatton* estate from the mortgage debt. The contest is between the devisee of the *Gatton* estate, which is subject to the mortgage, and the residuary legatee: and the question is, whether the money, which still remains due on the mortgage, must be paid out of the *Gatton* estate, or out of the property which passed under the residuary clause.

1849.
 LORD BROOKE
 v.
 THE EARL OF
 WARWICK.
 Judgment.

The case was argued yesterday; and I then thought, and I still feel no difficulty in coming to the conclusion, that the *Vice-Chancellor* put the right construction on this will.

The question is between the devisee of the *Gatton* estate and the residuary legatee. They were both intended by the testator to be freed from the debts. But the testator could not discharge the residuary estate from his debts, although he might exonerate any particular portion of his property. Independently of other arrangements, there is one provision in the will which renders his intention evident respecting the *Gatton* estate. I refer to the provision where he says—"It being my intention that the said *Surrey* estates should be held and enjoyed freed and discharged from all incumbrances whatsoever effected by me;" the manifest intention of the testator being, that the estate which he devised, and which was subject to the mortgage, should be freed and discharged from debt. He has expressed no such intention that the residuary estate should be dealt with in a similar manner. In that view of the case, there can be no doubt

1849.

LORD BROOKE
v.
THE EARL OF
WARWICK.

—
Judgment.

that the devisee ought to have the devised estate discharged from its incumbrances by means of the estate liable at law to pay the debts—that is, the personal estate. Has, then, the testator expressed any intention applicable to the particular facts which have occurred? No; but he has shewn an evident intention of discharging the devised estate. How, then, can the devisee of the *Gatton* estate be prejudiced by the insufficiency of the particular fund which was primarily liable to pay the debts?

The only way in which the case was attempted to be argued was this: that the gift of residue was a specific gift. This is founded on the supposition that the testator has disposed of it as a particular fund. There may be many cases where residuary clauses must be considered, not as general dispositions of the residue, but as dispositions of the residue of a particular fund; and such gifts would be equally specific with gifts of other parts of the fund. In an ordinary gift of the residue, part to A. and part to B., and the residue to C., C. is as much a specific legatee as either of the former legatees, A. or B. But this is a general gift of the residuary estate. What, then, is residuary estate? That which remains after payment of the debts. The testator gives it discharged from his debts; but he cannot do that unless he provides for the payment of them by other means. Therefore, if he has expressed an intention of doing what he is incapable of effecting, it must fail.

The appeal must be dismissed, with costs.

1849.

STEELE v. PLOMER.

Feb. 8th.

THE object of this suit was to obtain payment of some money due to the Plaintiff, out of trust-funds which were settled to the separate use of the wife, and of which the husband was a trustee. An appearance had been entered both for the husband and wife, but neither of them had put in an answer. The husband being in contempt for want of answer, a writ of attachment issued against him, and a return was made of *non est inventus*. A writ of sequestration was then issued and had been executed.

The husband then filed an answer for himself only, and obtained an order from the Vice-Chancellor *Knight Bruce*, that, upon payment or tender of the Plaintiff's costs, occasioned by the contempt, (such costs to be taxed by the Master, *in case the parties differed about the same*), the writs of attachment and sequestration should be discharged, and that no proceedings should be taken against the husband for want of his wife's answer. That order was obtained upon an affidavit that the wife was living separate from her husband, and was not under his control, and that he did not know where she was to be found.

A motion was now made before the *Lord Chancellor*, on behalf of the Plaintiff, that this order might be discharged.

Mr. *J. Parker* and Mr. *Elderton*, in support of the motion:—

The order is irregular upon several grounds: first, the

tempt will include the costs of a sequestration, although the sequestrators have not yet made a return; and the direction for the taxation of the costs should be absolute, and not dependant upon the fact whether the parties differ about the same.

Where an order was varied on appeal, upon grounds which were not mentioned to the Court below, the party moving was ordered to pay the costs of the application.

A husband in contempt for want of answer of himself and his wife, and against whom a writ of sequestration had issued, put in a separate answer without leave, and obtained an order that his contempt should be discharged on payment or tender of the costs of the contempt. A motion, by way of appeal, to discharge that order, was refused, the Plaintiff not having applied to take the answer off the file, and being therefore considered to have waived the irregularity. But the order was varied, by allowing the Plaintiff to take up the contempt at the point to which it had been already prosecuted, in case the answer should not be sufficient.

An order for payment of the costs of a con-

1849.
 STEELE
 v.
 PLUMER.
 —
Argument.

husband, being in contempt for want of answer of himself and his wife, put in a separate answer for himself only, without having obtained leave to do so. He might have applied to the Court for leave to answer separately, but he was not entitled to do so without leave: 1 *Daniell's* Chanc. Prac. 456.

In the next place, the order was obtained without the wife having notice of the motion: *Garey v. Whittingham* (a); *Gee v. Cottle* (b); and the Plaintiff cannot take any proceedings against her to compel her to put in an answer.

Another objection is, that the writs of attachment and sequestration are ordered to be discharged upon payment or tender of the costs. But if the answer is insufficient, the Plaintiff ought to be at liberty, under the 24th Order of April, 1828, to take up the process of contempt at the point to which it has been already prosecuted, as the time for excepting is not yet expired. If, however, this order stands, the Plaintiff will be obliged to begin *de novo*.

The costs of the sequestrators would probably not be allowed by the Taxing Master, because no return to it has yet been made; and the order ought to provide for their payment.

[The LORD CHANCELLOR.—As to the first point, the Defendant was clearly wrong in putting in a separate answer without leave. But, as the Plaintiff did not apply to have it taken off the file, he adopted the wrong, and accepted the answer. How, then, can the contempt be proceeded with, even if the wife does not put in her answer? As to the costs of the sequestrators, the Taxing Master must allow them, if he obeys the order.]

The order directs the costs to be taxed, in case the par-

(a) 1 S. & S. 163.

(b) 3 My. & Cr. 180.

ties differ: that imposes upon the Plaintiff the *onus*, of accepting the sum offered, or the risk of paying the costs of the taxation, under the 76th Order of 1828.

1849.
STEELLE
v.
PLOMER.

The LORD CHANCELLOR:—

No doubt the Defendant was irregular, and the object of the Plaintiff seems to be to take advantage of his irregularity, so as to place him in a situation from which he can never escape. He cannot make his wife put in her answer, and therefore he might have got leave to answer separately; but he allows the process to go on to a certain point, and then puts in his separate answer; which was perfectly irregular. But, if it is true that he does not know anything about his wife, it is very obvious, that, if the order of the *Vice-Chancellor* is set aside, the Defendant may remain in contempt for ever. The Court will not willingly leave a party in that position. In *Gee v. Cottle (a)*, there was a similar irregularity on the part of the Defendant. He ought to have answered for himself and his wife, but he put in an answer for himself only: and under those circumstances an order was made for his discharge, and it was assumed that he came within Sir *Edward Sugden's* Act (1 Will. IV, c. 36). A motion was afterward made to take his answer off the file. That was not done here, though such a motion would have raised the question at once. That motion was granted; and the Defendant afterwards moved for leave to file a separate answer. [His Lordship referred to his decision in *Gee v. Cottle (b)*.] The motion then stood over, which gave the Plaintiff an opportunity of taking the bill *pro confesso*.

Judgment.

The question is, what is to be done in this case? As to leaving the Defendant in contempt, that is quite out

(a) 3 My. & Cr. 180.

(b) Ibid. 182.

1849.
—
STEELE
v.
PLOMER.
—
Judgment.

of the question. It cannot be supposed that the Court will do that. But if the Defendant has occasioned any expense to the Plaintiff, he must make it good; he has committed an irregularity, and he must bear the loss. If, however, the answer is not sufficient, the Plaintiff ought not to be compelled to begin the process of contempt *de novo*.

[Mr. *Russell* and Mr. *Lewin*, who appeared for the Defendant, stated that he was willing to give any undertaking which would remove this difficulty.]

The LORD CHANCELLOR made an order that, upon the Defendant undertaking that if the answer was not sufficient, the process of contempt should be taken up at the point where it then was, this motion should be refused; but that the part of the *Vice-Chancellor's* order which related to the taxation of the costs of the contempt, must be varied by omitting the words "in case the parties differ about the same." As, however, some of the objections which had now been mentioned were not raised before the *Vice-Chancellor*, the party who made this motion must pay the costs of it.

1849.

STEELE v. PLOMER.

Feb. 10th &
24th.

THIS suit was between the same parties as the preceding case, and was instituted for a similar object.

The subpoena, for the husband and wife to appear and answer the bill, together with the office copy of the bill, and the order authorising such service, had been served on the husband in *Scotland*, under the 33rd Order of 1845. The husband had entered an appearance for himself, but not for his wife.

An application was now made, on behalf of the Plaintiff, for leave to enter an appearance for Mrs. *Plomer*.

The matter had been mentioned, in the first instance, to Vice-Chancellor *Knight Bruce*, who declined to make an order, but recommended it to be brought before the *Lord Chancellor*.

Where a husband resided out of the jurisdiction, (in *Scotland*), and his wife lived apart from him, and the husband had been served, under the 33rd Order of 1845, on behalf of himself and wife, with the subpoena and office copy of the bill and order, and the husband had entered an appearance for himself alone, the Plaintiff was held entitled, under that Order, to enter an appearance for the wife.

Mr. *Elderton*, in support of the application :—

Argument.

The *Vice-Chancellor* felt a doubt whether, under the 33rd Order of May, 1845, the Court could make such an order as was now asked for. The first article of that Order authorised the Court, where a Defendant was out of the jurisdiction, to order that the subpoena should be served on *such* Defendant, at such place as the Court should think fit. The effect of the 4th article was, that, when the Court was satisfied that *such* Defendant was duly served with the subpoena and copy of the bill and order, the Court might order an appearance to be entered for *such* Defendant.

In this case the subpoena was not actually served on the Defendant, for whom the Plaintiff now wishes to enter an

1849.
 STEELE
 v.
 PLUMER.
 —
Argument.

appearance. It was not served on her personally, or left at her dwelling-house, or usual place of abode, in the manner required by the 29th Order of May, 1845 ; but it was served on her husband only, and she was living apart from him. This created the difficulty which the *Vice-Chancellor* felt in the case.

If, however, a husband and wife resided within the jurisdiction, service on the husband would be sufficient service on the wife : and the question is, whether there is anything in the 33rd Order, which renders it necessary that the subpoena should be served on the wife personally in such a case as the present, before an appearance can be entered for her on the application of the Plaintiff.

Feb. 24th.
 —
Judgment.

The LORD CHANCELLOR (after stating the circumstances of the case, and reading the 29th and 33rd Orders of 1845) said, that there was no question as to the service on the wife. The foundation of an order authorising the Plaintiff to enter an appearance for a Defendant was proper service of the subpoena, either personally, or at the usual dwelling-house. No personal service was peremptorily required ; but merely proper ordinary service of the subpoena. If that service took place in *Scotland*, the parties were equally bound by it as if it had been in *England*. The husband had not done all which he was bound to do ; because he ought to have appeared for himself and his wife, but he had appeared for himself only.

He thought that service on the husband was sufficient ; and he should grant the application.

1849.

BLACKMORE v. SMITH.

Feb. 9th &
10th.

IN March, 1846, the Defendant, *Smith*, commenced an action at law against the Plaintiff. In June, 1846, this bill was filed, praying for a discovery and an injunction, and other relief. In July the common injunction issued, for want of answer, to restrain the action. In the interval between the filing of the bill and the issuing of the injunction, a fiat in bankruptcy issued against *Smith*. No steps had been taken by the assignees with respect to the action, nor had any of the parties proceeded any further in the suit. The Defendant had been declared entitled to his certificate, which, however, he had not yet taken up. In April, 1848, he put in his answer; and in July he moved to dismiss the bill, with costs, for want of prosecution. The Vice-Chancellor *Knight Bruce*, to whom the application was made, ordered that the Plaintiff should file a supplemental bill against the assignees of *Smith* within a month; and, in default, that the bill should be dismissed, with or without costs, according to the practice.

A few days after the bill was filed, the Defendant became bankrupt. The Plaintiff soon afterward obtained the common injunction, for want of answer, to restrain an action at law, and no further steps were taken, either in the action or in the suit, for two years. The Defendant had not yet got his certificate, but had been declared entitled to it. He then put in his answer, and was in a situation to move to dismiss for want of prosecution :—

Held, that, notwithstanding his bankruptcy, and the other circumstances of the case, he was entitled to an order that the bill should be dismissed, *with costs*.

The Registrar, acting, as was alleged, on the supposition that the Defendant had obtained his certificate, was of opinion that the bill ought to be dismissed, *with costs*; but the Plaintiff mentioned the matter again to the Vice-Chancellor *Knight Bruce*, after the expiration of the time which had been allowed by the Court for the filing of a supplemental bill against the assignees; and his Honor then directed that the bill should be dismissed, *without costs*. The Registrar then declined to give out the order in the form in which he had originally proposed to draw it up, dismissing the bill, *with costs*.

The Defendant, considering that the order which had been

1849.
 BLACKMORE
 v.
 SMITH.

Statement.

originally pronounced ought not to have been altered in this manner, brought the question before the *Lord Chancellor*.

Argument.

Mr. *Elderton* appeared for the Defendant, and referred to the case of *Monteith v. Taylor* (a), and insisted that that case, although sometimes misunderstood, was, in fact, an authority that a bill ought, in such a case as the present, to be dismissed, *with costs*.

Mr. *Bagshawe*, for the Plaintiff, contended, that, under the circumstances, the bill ought to be dismissed, without costs: that the object of the suit had been attained by getting the common injunction: that the action had never been proceeded with, and the assignees must, therefore, be considered as having abandoned it, and as having acquiesced in the injunction and in the propriety of the suit: and that, if any costs were payable, the assignees were the parties who ought to receive them, and that they ought not to be paid to the Defendant.

Randall v. Mumford (b), *Findlay v. Lawrence* (c), *Blanshard v. Drew* (d), and *Knox v. Brown* (e), were cited.

Judgment.

The LORD CHANCELLOR said, he never doubted but that if a party would not go on with his suit, it must be dismissed, with costs. He was quite sure what the practice used to be, and what the justice of the case re-

(a) 9 Ves. 615.

(b) 18 Ves. 424.

(c) 16 Law Journal, p. 333.

(d) 10 Sim. 240.

(e) 2 Bro. C. C. 186.

quired. If a party would not go on with a suit, the Defendant ought certainly to have the costs which he had been put to.

1849.
 BLACKMORE
 v.
 SMITH.
 Judgment.

His Lordship also said, that he did not understand how the Defendant's bankruptcy could affect his right to have the costs of the suit paid. That was a question between him and the Plaintiff; and, if the money was due, the question whether the bankrupt was entitled to keep it or was bound to pay it over to his assignees must be settled by other means. The assignees were not parties to the cause, and the costs could not be ordered to be paid to them; but they ought not to be lost altogether, merely because they must pass through the hands of the bankrupt.

The bill ought to be dismissed, with costs.

1849.

Jan. 31st.
March 14th.

After a decree for specific performance, the sole Plaintiff died. His personal representative filed a bill of revivor. One of the Defendants was supposed to be in *America*, but he had not absconded within the meaning of the 31st Order of May, 1845, and his actual place of residence was not known. Substituted service of the subpoena for him to appear to the bill of revivor, was allowed to be made upon the solicitor who had acted for him in the original suit.

NORTON v. HEPWORTH.

THIS was an *ex parte* application, on behalf of the Plaintiff, in a bill of revivor, for an order, that service of the subpoena to appear to that bill, upon the solicitor who had acted for all the Defendants in the original suit, might be good service on one of the Defendants, named *Thomas Firth*, who was now out of the jurisdiction. He and two other persons had been trustees of a composition deed, for the benefit of creditors; and the original bill had been filed against them in that character, to compel a specific performance, and a decree had been obtained against them. All the Defendants had appeared by the same solicitor, who had acted for them throughout all the proceedings in that suit. The Plaintiff (who was the sole Plaintiff) died, and the party, who obtained letters of administration to his effects, filed a bill of revivor, to have the benefit of the decree. No answer was required to that bill; and application was made to the solicitor who acted for the Defendants in the original suit, to ascertain whether he would appear for them in the revived suit, which he declined to do. He had, however, since entered an appearance for one of the Defendants, and the Plaintiff had entered an appearance for another of them, under the 29th Order of May, 1845. The other Defendant, *Firth*, could not be found; and, from the affidavits of the Plaintiff's solicitor, it appeared that he was most probably in *America*, but the place of his residence could not be ascertained; and there was no evidence to satisfy the Court that he ought to be considered as having absconded.

This application for substituted service was first made to the Vice-Chancellor *Wigram*, who refused to make any or-

der, having regard to the old practice when the Six Clerks represented the parties to a cause; his Honor being of opinion that the question, whether, since the abolition of those officers, and the transfer of their duties to the solicitors, a new practice should be adopted, ought to be left to the decision of the *Lord Chancellor*. The point was, consequently, brought before the *Lord Chancellor*.

1849.
NORTON
v.
HEPWORTH.
Statement.

The *Solicitor-General*, in support of the application :—

Argument.

The Plaintiff cannot enter an appearance for the Defendant under the 31st Order of May, 1845, because he has not absconded. Neither can he serve him abroad under the 33rd Order, because the place of his residence is not known. In *Weymouth v. Lambert* (a), *Hobhouse v. Courtney* (b), *Hornby v. Holmes* (c), and *Cooper v. Wood* (d), substituted service was allowed on the solicitors, attornies, or agents of Defendants who were out of the jurisdiction. The 4 & 5 Will. IV, c. 82, s. 1, allows substituted service on the steward or receiver of an absent Defendant.

There are some earlier cases, which appear unfavourable to the present application: *Geledneki v. Charnock* (e), *Henderson v. Meggs* (f), *Brown v. Lee* (g), *Lee v. Warner* (h); but, since those cases were decided, the practice of the Court has been very much relaxed upon this point; and although this is a *casus omissus*, so far as the Orders of May, 1845, are concerned, yet it seems to come within the spirit of them.

- (a) 3 Beav. 333.
- (b) 12 Sim. 140.
- (c) 4 Hare, 306.
- (d) 5 Beav. 391.

- (e) 6 Ves. 171.
- (f) 2 Bro. C. C. 127.
- (g) Dick. 545.
- (h) Ib. 546.

1849.
 ———
 NORTON
 v.
 HEPWORTH.
 ———
 March 14th.
 ———
 Judgment.

THE LORD CHANCELLOR said, that he considered this case to be within the principle laid down by his predecessor in *Murray v. Vipart* (a), and that there were, indeed, circumstances in it which were much stronger in favour of the application than any which existed in *Murray v. Vipart*; because in that case there was merely a letter from the solicitor, stating that the absent Defendant had authorised him to do what was necessary in the matter; but, in the present case, the solicitor, upon whom the Plaintiff proposed to serve the subpoena, had actually represented the Defendant, and acted for him during the whole progress of the suit; and the bill of revivor related to the same matter, and was, indeed, a necessary proceeding to give effect to the decree which had been obtained. He should, therefore, make the order for substituted service.

His Lordship also observed, that he entirely concurred in the opinions expressed by Lord *Lyndhurst*, that the greatest caution was necessary in making orders of this description; because, if they were made without due consideration, they might be the means of producing the greatest injustice, in consequence of the facilities they might afford to collusion between third parties, in the absence of the Defendant.

(a) 1 Ph. 521.

1849.

BEARDMER v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Feb. 17th,
21st, & 24th.

IN the month of December, 1848, a lease was executed by the Stour Valley Railway Company of their undertaking, established by an Act passed in the 9th and 10th years of the present Queen, to the London and North-Western Railway Company. The line of the Stour Valley Railway crossed two streets in the town of *Birmingham*, called *Navigation-street* and *Hill-street*, by means of cuttings below the levels of those streets; and the cutting below the level of *Hill-street* was sufficiently deep to allow of *Hill-street* being carried over the railway by a bridge without altering the level of *Hill-street*; but the cutting at *Navigation-street* was not sufficiently deep to allow of the line of that street being carried over the railway without altering the level of *Navigation-street*, and on a plan deposited with the clerk of the peace for the county of *Warwick*, pursuant to the

By a clause in a special railway Act, after reciting that plans and sections of the railway shewing the respective lines and roads thereof, and also books of reference containing the names of the owners, lessees, and occupiers of the lands through which the respective lines of railway were intended to pass, had been deposited with the clerks of the peace, it was enacted, that, subject to

the provisions in that and the recited Acts contained, it should be lawful for the Company to make and maintain the railway and works in the line and upon the lands delineated on the said plans. On one of the plans so deposited was a cross section, shewing the mode in which a particular street, in a large town, was to be carried over the intended railway by a bridge, and shewing also the intended approach to that bridge along the street to be an ascent of 1 in 40. The Railways Clauses Consolidation Act contained no restriction as to the height at which any bridge over a street was to be made, but only a restriction as to the ascent of a bridge to be made. In executing the works, the Company proceeded to make the approach to the bridge at an ascent of 1 in 115, by means of which they considerably raised the level of the street opposite the Plaintiff's premises, thereby obstructing the access thereto, and otherwise damaging the Plaintiff's enjoyment of his premises:—*Held*, that the Company had a right, under the Railways Clauses Consolidation Act, to raise the level of the street, and that they were not restricted from so doing by the clause in the special act, referring to the plans and sections deposited with the clerks of the peace.

Held, also, that the deposited plans referred to in the special act, *per se*, constituted no obligation, and, unless incorporated in the Act, they created no right between the parties to the suit; the plans being deposited not for the purpose of exhibiting the surface appearance, but of shewing what was the *datum* line.

The words "engineering works," in the 14th sect. of the Railways Clauses Consolidation Act, mean other engineering works *ejusdem generis*—that is, other engineering works in the formation of the railway itself.

Rules by which the Court is influenced in putting a construction upon different sections in an Act of Parliament which may appear opposed to each other.

In determining the question of costs, on an appeal, the Lord Chancellor places himself in the situation of the Judge in the Court below; and, if the motion has been improperly granted there, the Lord Chancellor reverses the order made, with the costs incurred in the original motion.

VOL. I.

M

L. C.

1849.
 BEARDMER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY Co.
 —
 Statement.

standing orders of the Houses of Parliament, was a cross section, shewing the mode in which *Navigation-street* was to be carried over the intended railway by a bridge, and shewing also the ascent of the intended approach to that bridge along *Navigation-street* to be 1 in 40. In executing the works, the Company, at the instance of the Commissioners of Paving for the town of *Birmingham*, proceeded to make the approach to the bridge, at an ascent of 1 in 115, instead of 1 in 40. *Hill-street* ran in a direction from north to south, and *Navigation-street*, which crossed *Hill-street* at right angles, ran in a direction from east to west; and the Plaintiff's premises, on which he carried on the business of a shoe and jobbing smith, were situated at the corner, at which the west side of *Hill-street* crossed the south side of *Navigation-street*. The Plaintiff insisted, that the only alteration in the level of *Navigation-street* authorised to be made was, by an inclination sufficient to carry that street over the line of railway at the ascent of 1 in 40, commencing not nearer to the Plaintiff's premises than the opposite side of *Hill-street*, being at a distance of thirty-six feet and upwards from the Plaintiff's premises. By altering the level of *Navigation-street*, and making the approach to the bridge only 1 in 115, and altering the level of *Hill-street* to an extent in height of five feet and upwards, the access to the Plaintiff's premises would be much obstructed, and the light of several ancient windows existing on the Plaintiff's premises darkened, and other parts of his premises rendered nearly useless to him. It was originally intended to raise the level of *Navigation-street*, where it crossed the railway by means of a bridge, six feet only; but, during the progress of the works, it was considered expedient, for the greater safety and convenience of the public, to build the bridge wider than was originally intended. It then became necessary to increase the height of the bridge in proportion, whereb the level of *Navigation-street* at that point was raised eight feet instead of six feet. The mode in which the alteration of the levels of the streets had been made was by raising the

levels to an extent of several feet immediately in front of and within the distance of six feet from the Plaintiff's premises, both on that side of the premises fronting *Hill-street* and on the side fronting *Navigation-street*; and thereby a large embankment of earth, within six feet of the Plaintiff's premises, had been raised. By the 35th sect. of the *Stour Valley Railway Act*, it was enacted as follows:—
 “And whereas plans and sections of the railway, shewing the respective lines and levels thereof, and also books of reference, containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers, of the lands through which the respective lines of railway are intended to pass, have been deposited with the clerks of the peace of the counties of *Warwick*, *Stafford*, and *Worcester*, be it enacted, that, subject to the provisions in this, and in the recited Acts contained, it shall be lawful for the said Company to make and maintain the said railway and works in the line and upon the lands delineated on the said plans.”

1849.
 BEARDMER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY CO.
 —
Statement.

The 13th sect. of the General Act [*Railways Clauses Consolidation Act*] was as follows:—“Where in any place it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly; and where a tunnel is marked on the said plan or section, as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land, in which such tunnel is intended to be made, shall consent that the same shall not be so made.” The 14th sect. of the same Act was as follows:—“It shall not be lawful for the Company to deviate from, or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits, and under the following conditions (that is to say), Subject to the above provisions, in regard to altering levels, it shall be lawful for the Company to diminish the inclination or gra-

1849.
 BEARDMER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY Co.
 —
Statement.

dients of the railway to any extent, and to increase the said inclination or gradients as follows (that is to say): in gradients of an inclination not exceeding 1 in 100, to any extent not exceeding ten feet per mile, or to any further extent which shall be certified by the Board of Trade to be consistent with the public safety and not prejudicial to the public interest; and, in gradients of or exceeding the inclination of 1 in 100, to any extent not exceeding three feet per mile, or to any further extent which shall be so certified by the Board of Trade as aforesaid: It shall be lawful for the Company to diminish the radius of any curve described in the said plan, to any extent which shall leave a radius of not less than half a mile, or to any further extent, authorised by such certificate as aforesaid from the Board of Trade: It shall be lawful for the Company to make a tunnel not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorised by such certificate as aforesaid from the Board of Trade."

The 16th sect. of the General Act is set forth in his Lordship's judgment; and, by the 50th sect., it is enacted, that "every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following amongst other regulations:"—"The ascent shall not be more than one foot in thirty feet, if the road be a turnpike-road; one foot in twenty feet, if a public carriage road; and one foot in sixteen feet if a private carriage road, not being a tram-road or railroad; or if the same be a tram-road or railroad, the ascent shall not be greater than the prescribed rate of inclination; and, if no rate be prescribed, the same shall not be greater than as it existed at the passing of the special Act."

On application to the *Vice-Chancellor of England*, on the

9th of February last, his Honor granted an injunction against the London and North-Western Railway Company, in the terms stated by the *Lord Chancellor* in his judgment.

1849.
 BEARDMER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY CO.
 —
Statement.
 —
Argument.

Mr. *Bethell* and Mr. *Speed* now moved to discharge the order of his Honor.

To sustain the injunction, the other side must satisfy the Court that the plans deposited with the clerk of the peace, containing the cross section, were parts of the special Act, and must be abided by ; and that the Company cannot exercise the ordinary powers given it by the Railways Clauses Consolidation Act, which are powers to deviate both laterally and vertically. It was found by the Company that the ascent of 1 in 40 could not be preserved, and the alteration of the approach to the bridge was a necessary consequence of the alteration of the height of the bridge. The deposited plans contain nothing inconsistent with the proceedings of the Company, and are not referred to by the 35th sect. of the special Act to oblige the Company to adhere thereto, but with reference only to the line of the railway. There is nothing in the special Act inconsistent with the 16th sect. of the General Act; and if the case be one of nuisance, as is alleged by the bill, this Court will not interfere until the Plaintiff has established his case in a Court of law.

The LORD CHANCELLOR, during the argument of Mr. *Bethell*. observed, that the principle involved in the present case seemed to be the same as in the case of *The Feoffees of Heriot's Hospital v. Gibson* (a).

The other cases cited in support of the motion were,

(a) 2 Dow, 301.

1849.
 BEARDNER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY CO.
 —
Argument.

The North British Railway Company v. Tod (a); Squire v. Campbell (b); Breynton v. London and North Western Railway Company (c); Attorney-General v. Nichol (d).

Mr. *Stuart* and Mr. *Craig*, in support of the injunction:—

The deposited plans are binding on the Company as to *engineering works* mentioned in the 14th sect. of the Railways Clauses Consolidation Act; and here the Company never thought of any deviation in the line of the railway under the special Act, and have no right to alter any engineering work.

[The LORD CHANCELLOR.—The words, “other engineering works,” contained in the 14th sect. of the Railways Clauses Consolidation Act, seem to refer to the general line and level of the railway, and not to the alteration of the levels of streets, roads, or ways, mentioned in the 16th sect. of that Act.]

It could not have been intended, by the 16th sect. of that Act, to give the Company power to alter the levels of streets whenever they thought proper.

[The LORD CHANCELLOR.—The Company may alter the levels of streets within the limits of deviation. Your argument will not apply to a case of deviation; for, if it were valid, make only the slightest deviation, and all the plans and sections are gone. In *The North British Railway Company v. Tod*, the argument was the same as in the present case; and it was there held, that the surface plan was not binding, because not incorporated in the Act; but the line of the railway, as referring to the *datum* line, was incorporated in it.]

(a) 12 C. & F. 722.
 (b) 1 My. & Cr. 459.

(c) 10 Beav. 238.
 (d) 16 Ves. 338.

If the Company are correct in what they have done, the 16th sect. of the General Act must be considered as repealing the 14th sect.

1849.
BEARDMER
v.
THE LONDON
AND NORTH-
WESTERN
RAILWAY Co.
Argument.

[The LORD CHANCELLOR.—Is there any Act of Parliament which directs the deposit of plans?]

The 35th sect. of the special Act is the only one which speaks of plans.

[The LORD CHANCELLOR.—That is confined to the railway line and level, and does not extend to collateral works. Are not the *engineering works*, referred to in the 14th sect. of the General Act, confined to the railway itself? Or, do those words extend to collateral works? In *The North British Railway Company v. Tod*, the parliamentary sections were entirely rejected, and were not allowed to be referred to in construing the Act.]

The question in *The North British Railway Company v. Tod* was as to the power to deviate, and there it was a plan exhibited; whereas here, the plans are deposited; and, in the case of *Heriot's Hospital*, the plan was exhibited, not referred to by the charter.

[The LORD CHANCELLOR here adverted to that part of the judgment of the House of Lords in *The North British Railway Company v. Tod* (a), where, after noticing the doctrine laid down by Lord Eldon and Lord Redesdale, in the case of *Heriot's Hospital*, it states, that, "we are not to look at what was represented upon the plan, except so far as its representation is incorporated in and made part of the Act of Parliament."]

The Plaintiff contends, that the special Act incorporates

(a) 12 C. & F. 732.

1840.
 BEARDNER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY CO.
 —
Argument.

the Railways Clauses Consolidation Act, and the Railways Clauses Consolidation Act incorporates the plan; and the cross section on the plan deposited gives the level of the railway and the surface of the land. The roads and approaches are the only engineering works important to be described.

The 8th, 9th, 10th, 11th, 13th, 14th, and 15th sections of the Railways Clauses Consolidation Act were also read and commented on in support of the injunction; in the course of which his Lordship observed, with reference to the 15th and 16th sections, that it was difficult to understand how the course of a *river*, mentioned in the latter section, could be altered by a deviation of ten yards only. With reference to the form of the injunction, the case of *Earl of Mexborough v. Bower (a)* was cited in support thereof.

Mr. *Bethell* replied.

Feb. 24th.
 —
Judgment.

THE LORD CHANCELLOR:—

In this case an injunction has been granted by the *Vice-Chancellor*, restraining the Company in these terms:—
 “That an injunction be awarded to restrain the Defendants, the London and North-Western Railway Company,” and so on, “from continuing to make the embankment or incline in the course of being made by them in *Hill-street*, in *Birmingham*, in the county of *Warwick*; and from continuing to make the embankment or incline in the course of being made by them in *Navigation-street*, in *Birmingham*, to the westward of the point at which the east side of *Hill-street* crosses *Navigation-street*; and from in any manner altering the level of that part of *Navigation-street* which lies to the westward of the point at which the east side of *Hill-*

(a) 7 Beav. 127.

street crosses Navigation-street; and from altering the level of Navigation-street aforesaid to any other extent or in any other manner than is shewn upon the plans and sections deposited with the clerk of the peace of the county of Warwick, for the purposes of the Birmingham, Wolverhampton, and Stour Valley Railway."

1849.
 BEARDMER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY Co.
 Judgment.

Now that is an injunction restraining the Company from deviating from the levels as appearing on the face of the plans deposited with the clerk of the peace, under the Act. And, upon looking at the bill, I find the equity put by it is quite in conformity with the injunction granted by the Court, the equity being, that, previously to the Act passing, according to the rules and regulations of the Houses of Parliament, certain plans were deposited with the clerk of the peace, on the face of which there was represented the line that the railway was to take, crossing *Navigation-street*; which street is again intersected, at a short distance from the place where the railway crosses it, by *Hill-street*. The plan represents those two streets, and it represents the line which the railway is to take; and the bill puts it on the ground, that, these plans having been exhibited, and being, I presume therefore, part of the contract, the parties are not at liberty to deviate from the plan as represented by those two descriptions. Now that, in point of fact, is neither more nor less than bringing forward over again what the House of Lords have twice decided is no ground for the interference of a Court of Equity. The two cases I now refer to, as I understand them, are identically the same. In one of them, viz. *The North British Railway Company v. Tod*, the plan deposited with the clerk of the peace, before the Act was passed, represented the line of the railway, and of course represented the level at which the railway was intended to pass through certain lands, and it also represented the surface level of the land. It represented, therefore, the line in which the railway was to pass through the land by

1849.
 BEARDMER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY CO.
 —
Judgment.

a cutting, and also the surface level of the land. The Railway Company, in pursuance of their powers, deviated within the prescribed limits, and did not carry their railway precisely in the line which was contemplated by the plan, but varied it within the limits allowed under the Act; and the railway being on the side of an inclined surface, the preserving of the same level would necessarily have affected its proximity to the surface level of the land. If it was higher up the hill, of course there would be a deeper cutting; and if it was lower down the hill, there would be a less deep cutting. It would then be nearer the surface, and the proprietor of the land would find himself very much annoyed; but the Company having so altered the line of their railway, and approached nearer the surface, and thereby added very much to the annoyance and the disfigurement of the ground which was within view from the proprietor's house, he applied for an injunction, or an interdict, which is the same thing, to prevent the Railway Company from so far deviating from the plans exhibited. The House of Lords had that question to decide, and did so without adopting any new rule, but merely applying the rule (which, though easily comprehended, does not appear to have been very distinctly understood), laid down, long before, in the *Heriot's Hospital case* (a), by which it was decided, that the plans, *per se*, constituted no obligation, and conferred no right; but that the plan, so far as it was referred to in the Act, and incorporated in its enactment, became part thereof, and was, therefore, material, in order to construe the enactment. For instance, if the Act of Parliament enacted, that the railway should go in the line described in a particular plan, it is obvious that the plan must be referred to, in order to understand the enactment. So far, therefore, as it was incorporated in the Act, it was part of the Act; and, so far as it was not incorporated therein, it was a matter

(a) *Fcoffees of Heriot's Hospital v. Gibson*, 2 Dow, 301.

not creating any right between the parties. That was the rule, which had been established for a great number of years; and, in the case of *The North British Railway Company v. Tod*, it was again acted upon in the House of Lords. In that case, the plan, as far as it represented the surface, was departed from. The surface, after the railway had been completed according to the deviation, no longer exhibited the same surface appearance as it had done previously; the railway was no longer carried at the same distance from the surface as it was before. But the House of Lords came to this conclusion, that the plan was not referred to for the purpose of exhibiting the surface appearance, but it was referred to for the purpose of shewing what was the *datum* line, what was the level at which the railway itself was to be carried; and, therefore, inasmuch as the Act referred to it only for the purpose of the *datum* line, it was nothing to say that the plan of the surface then would be, in every respect, different from the surface as represented on the plan, because the plan was not part of the Act. That is a very intelligible rule, and very easily applied to the various cases.

1840.

BEARDMER

v.
THE LONDON
AND NORTH-
WESTERN
RAILWAY CO.

Judgment.

Now, in the present case, the plan exhibited shews, no doubt, *Hill-street*, and also *Navigation-street*, in the state in which those streets existed before the railway was made; it shews the line of the intended railway, and all those parts of the neighbourhood which were within the operation of the Act, that is to say, all those pieces of land which the Railway Company had power to deal with according to the provisions of the Act; but it represented them as they then existed, it did not represent them for the purpose of shewing in what state they were to exist after the railway was completed, but represented a portion of the land which might or might not be affected by the railway, and beyond which the powers of the Railway Company were not to extend. The plan also pointed out the line of the intended railway,

1849.

BEARDMER

v.

THE LONDON
AND NORTH-
WESTERN
RAILWAY CO.

Judgment.

which, of course, was not to be necessarily carried into operation precisely in that line, because the Act of Parliament authorises, to a certain extent, a deviation. In the course of effecting these works, the railway passing in a cutting, the Company had to build a bridge for the purpose of continuing *Navigation-street* over their railway; they were obliged to cut through *Navigation-street*, and, having done so, the Company were of course under the necessity of restoring the street, with a view to enable passengers, horses, and carriages to pass along it.

Now, the Railways Clauses Consolidation Act contains no restriction as to the height at which any bridge over a street is to be made; it contains a restriction as to the ascent of a bridge, but it is left entirely to the discretion of the Company what height any bridge should be made over the cutting through which their railway is to pass; and it is obvious that, as they had a power of deviation, that is, of a vertical deviation to a certain extent, the height of the bridge to be built by them would depend on the fact whether they did or did not exercise the power of vertical deviation. If the Company built their bridge lower, the bridge might be less high, with reference to the surface level of the railway; if they built the bridge higher, then, of course, the bridge must necessarily be higher with reference to the surface-level; but the Act contains no restriction on that subject at all, the only restrictions being in the 50th sect., which merely provides with reference to the ascent to be made to the bridge, that it shall not be more than one foot in thirty feet, if it be a turnpike road, or one foot in twenty feet, if it be a public carriage road, or one foot in sixteen, if it be a private carriage road; and, subject to those restrictions, the Company were at liberty to build their bridge at any height they might find convenient.

The whole argument turned on the construction to be put

on the 16th sect. of the Act, which provides, that, "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the Company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works: that is to say—They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper." It then proceeds thus: "They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works, over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper," making compensation to the parties injured by the course they think proper to adopt. Here is a very distinct parliamentary authority to deal with all the lands within the plans deposited, or mentioned in the books of reference, as they think proper; the Company may make roads, inclined planes, and so on, and they may deal with them in such a way as they may think right, for the purpose of more effectually carrying their works into effect, and rendering them of the least possible inconvenience to the proprietors of the adjoining land. But the power is

1849.
 BEARDMER
 v.
 THE LONDON
 AND NORTH-
 WESTERN
 RAILWAY CO.
 Judgment.

1849.
BEARDMER
v.
THE LONDON
AND NORTH-
WESTERN
RAILWAY CO.
—
Judgment.

unlimited, and the restriction, as to the land over which these unlimited powers are to be exercised, is applied only to such lands as are described in the plans, or mentioned in the books of reference. Now, it is not in dispute that *Hill-street* and *Navigation-street* are within the plans, and are described in the books of reference. Then, having this power, what are the Company doing? Why, they are raising the level at a particular point of these two streets; and the 16th sect. of the Railways Clauses Consolidation Act says, that that is precisely what they may do; "they may alter the level of roads, streets, or ways;" these are roads, streets, or ways; and what the Company are doing is the raising the level of those streets, roads, or ways. It is difficult to conceive any parliamentary authority more clear and distinct than that which is conferred by the 16th sect. of this Act.

Then, it is urged on behalf of the Plaintiff, that, though that be true, there may be other parts of the Act which make the representation of these plans conclusive between the parties. It would, indeed, be very strange if any such parts of the Act were to be found, inasmuch as they would be in direct contradiction to the 16th sect.; still, however, we must look to see whether it be true that there are other parts of this Act which refer to the plans as conclusive that the line shall not vary from what appears to be described on the face of the plans themselves. Now it would be very extraordinary if we found any such; and for this reason, that there is a power of deviating laterally. It is quite obvious, that, if the line of the railway be deviated from, it would bring it nearer to the land on one side of the projected railway, and further from the land on the other side of the projected railway; and, thereby, you immediately alter the relative situation of the railway with the adjoining land, as described in the plan. But, according to the argument, all the other lands must remain exactly

1849.

BEARDMER

v.

THE LONDON
AND NORTH-
WESTERN
RAILWAY Co.

Judgment.

where they are; they are described as of a certain level; and, although the Company would have power to deviate laterally to a certain extent from the line laid down on the plan, they have no power to accommodate the neighbouring land, or the neighbouring estates, to the line so adopted by the deviation. It is quite obvious it would reduce the case to an absurdity to give them a power to do that in one part of the land, and in another part of the land deprive them of the means of carrying it into effect. But, upon perusing the other clauses of this Act, I find nothing like a recognition of the plan, as describing the neighbouring lands, and providing that they shall remain in the state there represented.

Now the only section that is referred to with anything like an appearance of confidence, is the 14th, and the 13th and the 14th sections must be read together, as they conduce to the construction to be put on the 14th. The 13th sect. says "Where in any place it is intended to carry the railway on an arch, or arches," clearly confining it to the railway itself; that is, the line of the railway. Then comes the 14th sect., which says that, "It shall not be lawful for the Company to deviate from, or alter the gradients, curves, tunnels, or other engineering works, described in the said plan or section, except within the following limits, and under the following conditions." Then follow the limits and conditions, which are all confined to the line of the railway itself. The words used are relied upon to show that this is an enactment, that there shall be no departure from the engineering works, and that these engineering works mean all works which might become necessary in consequence of the making of the railway. It is clear that these other engineering works mean other engineering works *ejusdem generis*, that is, other engineering works in the formation of the railway itself. There is nothing in the 13th sect., nor is there anything in the 14th

1849.

BEARDMER

v.

THE LONDON
AND NORTH-
WESTERN
RAILWAY Co.*Judgment.*

sect., referring to anything but the works for the purpose of making the railway itself: and the exceptions and conditions are all exceptions and conditions confined exclusively to the works of the railway itself. Now those are the only words which admit of any argument at the bar, that there is this gross inconsistency on the face of the Act, viz. that by the 14th sect. it is provided that there shall be no deviation from the works as represented on the plan; and the 16th sect. gives the Company the power to alter the level of the roads as they shall think proper. Of course, where there are two sections which according to one construction would be directly opposed to each other, and another construction, by far the most natural and obvious, and consistent with the common use of language, which would create no such inconsistency, there is no choice between adopting the one and the other of those constructions; the 14th sect. being confined to the railway itself, and the 16th sect. being intended generally to relate to everything that the Company might think it expedient to do throughout, for the purpose of the undertaking, and which, in that section, are called accommodation works—a word not to be found in the 14th sect. at all, and introduced into the 16th sect., because that section is meant to apply to those collateral works which may become necessary in consequence of the principal works being carried into effect. There is no use in looking through the other sections of the Act; I do not think that there are any which come at all near the point which the Plaintiff wished to attain: and the 14th sect., which I observed upon, is not at all aiding the construction.

So much for the Railways Clauses Consolidation Act: now the only description we find in the particular or special Act is the 35th sect., which it is quite clear refers only to the line of the railway. [Here his Lordship read the 35th sect. of the special Act, for which, vide ante, p. 163.]

Now the result of the whole is, that that 16th sect. gives a power, which is clearly the power that these parties are about to exercise, and is not restricted or controlled by any other part of the Act.

1849.
BEARDMER
v.
THE LONDON
AND NORTH-
WESTERN
RAILWAY Co.
—
Judgment.

It is, therefore, distinctly brought within the case of *The North British Railway Company v. Tod*, that the object for which the plans are referred to is, the line of the railway—they are not referred to for the purpose of ascertaining the position of other lands described and referred to in the book of reference; they are only introduced there for the purpose of shewing what were the lands that might be affected, and were within the option of the Railway Company in execution of their powers; and therefore it is precisely what the House of Lords decided in the case of *The North British Railway Company v. Tod*, viz. that the plans were operative, only so far as they were intended to be referred to for the purpose of explaining the enactment, and were not operative, so far as you shew the plans were not adopted by the Act, or incorporated in it by the clauses.

It appears to me, therefore, very clear, that this case is one that falls within those which have already been decided, and that there is no ground for the injunction which has been granted; and therefore the order for the injunction must be discharged.

Now, that would be all that it would be ordinarily necessary to do; but a doubt has been raised as to whether that which the Railway Company are doing is done within their own power or under the power of the local Commissioners. That is only material with the view I mentioned before, and which the acquiescence of the Railway Company renders it unnecessary for me to make any further observation upon. It was hardly possible to leave that question open;

1849.

BEARDMER
v.
THE LONDON
AND NORTH-
WESTERN
RAILWAY Co.
—
Judgment.

for it might create some difficulty in the prosecution of the claim of the Plaintiff to compensation for the damage which he might sustain. The Railway Company, however, have met that by saying, that they would undertake the responsibility of making whatever compensation the Plaintiff is entitled to claim; and that undertaking will therefore be recited in the order I now make.

On Mr. *Craig* expressing a hope that the Company would not have the costs given them of the motion before the *Vice-Chancellor*—

The LORD CHANCELLOR observed, that there was no foundation for the motion; that he put himself in the situation that the *Vice-Chancellor* was in; and if the motion had been originally made before him, and he took the same view of it as he then did, he should have refused the application, with costs; and that was the course he always adopted.

1849.

ALLFREY v. ALLFREY.

Feb. 16th,
17th, & 21st.

GEORGE ALLFREY, the Plaintiff's father, died on the 23rd of April, 1802, intestate, leaving his widow, his mother, *Mary Allfrey*, his younger brother, *Edward Allfrey*, several sisters, and four children then born and infants, viz. *George Allfrey*, *Edward Thomas Allfrey*, *John Stenning Allfrey*, and *Mary Allfrey*, four of the Defendants, and one other child, *William Allfrey*, the Plaintiff, then being *en ventre sa mère*, him surviving. The Plaintiff was born on the 25th of September, 1802. On the intestate's death, his widow, *Kitty Allfrey*, became entitled to one-third of his clear residuary personal estate, and the five children became entitled to the remaining two-thirds, in equal fifth parts. *Kitty Allfrey* renounced administration to her deceased husband's estate and effects; and thereupon, *Edward Allfrey*, (without any previous renunciation by the mother, *Mary Allfrey*,) on the 17th of June, 1802, procured general letters of administration (not *durante minoritate*) of the estate and effects of the intestate, to be granted to him by the Prerogative Court of the Archbishop of *Canterbury*, on his

A. died intestate in the year 1802, leaving his wife and several children surviving him. *B.*, his brother, by means of misrepresentation, procured letters of administration to be granted to him, and placed himself *in loco parentis* to the children. The youngest child attained twenty-one in September, 1823, and in May, 1825, he signed an account furnished him by *B.*, acknowledging, in writing, at the foot of it, that he had had a satisfactory investigation of that account, and the ad-

ministrator's general account of the intestate's estate and effects, and confirmed the same. In January, 1828, he received the sum appearing on the signed account, as the balance due to him in respect of his share of the intestate's estate. In September, 1843, he filed a bill seeking to open the account. At the hearing, divers errors were proved to exist in the administrator's accounts; some entries made by the administrator in his books being fictitious, and some items being omitted in his accounts. Notwithstanding seventeen years had elapsed since the settlement, and two years since the discovery of errors in the administrator's accounts, the Court set aside the account, and decreed the same to be taken anew, declining to limit the relief to the right to surcharge and falsify the account.

Where possible injustice, from the loss of documents or evidence, after a great lapse of time, may arise to a party, the Court will give directions to the Master to state specially any difficulty he may find on the circumstances appearing before him.

In considering whether a decree ought to be made opening accounts generally, or only to surcharge and falsify, if it be a question whether the one party is likely to suffer injustice more from one form of decree than the other from the other form of decree, the Court ought to lean towards the side of an injured party, rather than to the side of the offending party.

The rule laid down in *Vernon v. Vawdry*, 2 Atk. 119, and followed in *Wedderburn v. Wedderburn*, 2 Keen, 722, and 4 My. & Cr. 41 approved.

1849.
 ALLFREY
 v.
 ALLFREY.
 —
Statement.

untruly deposing that the intestate died without child or parent.

Besides his share of the intestate's personal estate, the Plaintiff was entitled, as the youngest son, on the death of his father, to certain hereditaments of the tenure of borough English, and to certain copyhold hereditaments situate in the county of *Sussex*. *E. Allfrey* took upon himself the office of trustee of the Plaintiff, and received the rents of the real estate, to which the Plaintiff became absolutely entitled on his father's decease, and he was also appointed, by the lady of the manor of which the copyhold hereditaments were holden, the guardian of the Plaintiff in respect thereof. *E. Allfrey*, in short, placed himself *in loco parentis* to the Plaintiff and his brothers and sister, and made payments from time to time to them in respect of their interests in the intestate's estate.

Kitty Allfrey died on the 22nd of January, 1822, and her will was proved by *E. Allfrey*. *E. Allfrey* died on the 6th of June, 1834, and his will was proved by his widow, *Margaret Allfrey*, his son, *R. Allfrey*, and his nephew, *G. Allfrey*, the Plaintiff's brother, who were appointed his executors; and, on the 11th of August, 1841, *G. Allfrey* procured letters of administration to be granted to him *de bonis non* of the estate and effects of *G. Allfrey*, deceased; and *E. T. Allfrey*, on the 4th of September, 1843, procured letters of administration *de bonis non* of *Kitty Allfrey*, to be granted to him. Two bills were filed by the Plaintiff; one in respect of the intestate's personal estate, against *G. Allfrey*, *Margaret Allfrey*, *R. Allfrey*, *E. T. Allfrey*, *J. S. Allfrey*, and *Mary Allfrey*, (since deceased,) praying that an alleged settlement of accounts between *E. Allfrey* and the Plaintiff might be declared invalid; and that an account might be taken of the personal estate of the intestate, received or possessed by *E. Allfrey*, and that his estate might

be charged in account with the balances, which, at the end of every half-year after the expiration of one year after the death of the intestate remained in the possession of *E. Alfrey* during his lifetime, and with interest thereon, with half-yearly rests; and that it might be declared that *E. Alfrey* ought to have invested the amount of such balances at the end of every half-year, in the purchase of stock in the public funds, and invested the dividends thereof from time to time, and that what might be found due might be paid out of the estate and effects of *E. Alfrey*. The other bill, having relation to the intestate's real estate, was filed against the executors of *E. Alfrey* only, and sought a full account of his receipts and payments in respect thereof.

The Plaintiff attained his majority on the 25th of September, 1823; and, in the month of May, 1825, the Plaintiff, at the dictation of *E. Alfrey*, wrote, in a book of accounts relating to the intestate's estate, and purporting to shew a balance of 17*l.* 12*s.* as due to the Plaintiff, the following words:—"Having had a satisfactory investigation, and agreed the addition of the foregoing account, as well as the administrator's general account of the effects of my deceased parent, I do hereby confirm the same, and the above balance of 17*l.* 12*s.*" The Plaintiff at the same time subscribed his name to the words so written by him, and, as alleged by the Plaintiff, at the instance of *E. Alfrey*. On the 11th of January, 1828, the Plaintiff received the alleged balance of 17*l.* 12*s.* from *E. Alfrey*.

Both bills were filed on the 5th of September, 1843; and about two years previously thereto, the Plaintiff was requested to examine *E. Alfrey's* books of account, with reference to the claim of one of his sons to some *Newhaven Bridge* shares; and whilst so engaged, the Plaintiff discovered numerous errors, indicating (as he considered) intentional misrepresentations of the intestate's estate by *E.*

1849.
 ALFREY
 v.
 ALFREY.
 —
Statement.

1849.
 ALLFREY
 v.
 ALLFREY.
 —
 Statement.

Allfrey. On the cause coming on for hearing, it appeared that, in fact, there were numerous errors in the accounts kept by *E. Allfrey*. One of the books of accounts kept by him, and referred to in the pleadings, was his general administration account-book, as the administrator to the intestate's estate; and the other was a book containing his separate accounts with the Plaintiff and the other four children of the intestate, and also the Plaintiff's account comprising rents admitted to have been received by *E. Allfrey* from the intestate's real estates; and these were blended together. There were also four private cash-books of *E. Allfrey* adduced in evidence, exhibiting the receipts and payments of *E. Allfrey* during the interval occurring between the 1st of January, 1809, and the 31st of March, 1828. No general account-books, however, of *E. Allfrey* were forthcoming of date prior to January, 1808.

The intestate was a wine-merchant, and lived at *Friston*, in the county of *Sussex*, and kept an account with the bank of *Molyneux, Hurley, & Co.*, at *Lewes*, afterwards *Whitfield & Co.* (whose town agents were *Esdaile & Co.*), which was continued by his administrator, *E. Allfrey*, who was a member of the firm of *Blake, Hobson, & Co.*, underwriters, in the city of *London*. A partial account was opened and kept in the books of that firm with *G. Allfrey*, the intestate, during his lifetime, which was continued by his administrator after the intestate's decease. *E. Allfrey* employed, as his private bankers, *Robarts, Curtis, & Co.*, bankers, in the city of *London*. The first item complained of by the Plaintiff was a sum of 30*L.*, of the date of September 4th, 1802, in the banking account intitled "Dr., *Edward Allfrey*, administrator to the effects of *George Allfrey, Cr.*," which had not been carried by *E. Allfrey* to the credit of the intestate's estate; and, on the 3rd of May, 1803, *E. Allfrey*, as evidenced by the same banking account, drew on Messrs. *Esdaile & Co.*,

as the agents of the *Lewes* Bank, for the sum of 500*l.*, which was not carried to the credit of the intestate's estate. On the 2nd of May, 1803, he carried to the credit of his account, in the books of *Blake & Co.*, with the estate of the intestate, the sum of 500*l.*; and he afterwards took credit to himself, in the administration account, for all the items on the debit side of the account of the firm, but took no notice of the 500*l.* On the 8th of November, 1803, there was a draft by *E. Allfrey*, paid by *Esdaile & Co.*, for 228*l.* 1*s.*, by means of a cheque, dated the 7th of that month; and, on the same day, in his private account, credit was given him for the sum of 228*l.* 1*s.*, being the same sum. On the 29th of November, 1804, a like transaction occurred as to a sum of 200*l.*; and, on the 18th of May, 1805, there was a draft of 1400*l.* credited to him, which was entered in his private account as of the 16th of that month. At the time of the intestate's death there was a sum of 9100*l.* Three per Cent. Reduced Bank Annuities, standing in his name in the books of the Bank of *England*. From *E. Allfrey's* accounts it would appear, that, on the 20th of May, 1808, he credited the intestate's estate with the produce of the sale of 9720*l.* Reduced Three per Cent. Annuities, viz. with 6542*l.* 0*s.* 8*d.* sterling money; and, on the same day, a purchase was, according to his books, made by *E. Allfrey*, of 7800*l.* Four per Cent. Stock for the sum of 6600*l.* 15*s.* sterling, whereas, in reality, the administrator, on the 26th of July, 1802, sold out 4000*l.*, part of the sum of 9100*l.* Three per Cent. Reduced Annuities; and, on the 17th of August, in the same year, transferred the remainder of that sum of stock into his own name. The entry, therefore, in his accounts by the administrator, of the sale of the 9720*l.* Three per Cent. Reduced Annuities, as well as of the dividends in respect thereof, were fictitious: the entry, also, of the purchase of the 7800*l.* Four per Cent. Stock appeared to be fictitious. The sum of 9720*l.* Reduced Three per Cent.

1849.

ALLFREY

v.
ALLFREY.

Statement.

1849.
 ALLFREY
 v.
 ALLFREY.
 —
 Statement.

Annuities would appear to have been made up of the 9100*l.* Three per Cent. Reduced Annuities and 620*l.* Reduced Three per Cent. Annuities, for which credit was taken in *E. Allfrey's* books on the 2nd of March, 1803, as purchased with the sum of 437*l.* 17*s.* 6*d.* sterling, if such entries were not fictitious. It had been also recently discovered that the price of the Three per Cent. Reduced Stock, when it was actually sold and transferred by the administrator, was higher in price than at the time when it was sold, according to the representation in the accounts. It further appeared, from *E. Allfrey's* accounts, that there had been an omission to give the Plaintiff credit for three sums of 20*l.* 16*s.* each, being the amount of half-yearly dividends on a sum of 1040*l.* Four per Cent. Stock, which accrued in October, 1821, and April and October, 1822.

With reference to the real estates of the intestate, it appeared there was, amongst other things, an omission in *E. Allfrey's* accounts of any credit for the rents of the copyhold estates which accrued between the time of the intestate's death and the month of January, 1804, although it clearly appeared, from the production of the Plaintiff's admission to the copyhold estates, on the 9th of November, 1803, that *E. Allfrey* was appointed the Plaintiff's guardian and receiver of the rents and profits thereof, from the intestate's death.

The answer of the Defendant *G. Allfrey* contained an admission to the effect that *E. Allfrey* would not have died so wealthy as he did, if he had kept and invested the intestate's estate separately and distinctly from his own.

Application had been made to the Bank of *England* on behalf of the Plaintiff, to inspect the entries in its books of

sales of stock by *E. Allfrey*, between the date of the intestate's decease and the year 1809; but the Bank declined compliance therewith.

1849.
ALLFREY
v.
ALLFREY.
—
Statement.

On the hearing of the cause, before the *Master of the Rolls*, his Lordship made a decree, declaring that the Plaintiff was not bound by the settled account, and directing the usual accounts to be taken of the intestate's estate and effects, with liberty for the Master to state special circumstances, and whether there was any and what difficulty in taking the accounts, arising from the lapse of time and loss of evidence and documents.

The Defendants, *G. Allfrey*, *Margaret Allfrey*, and *R. Allfrey*, having appealed against the decree of the *Master of the Rolls*, the appeal now came on to be heard before the *Lord Chancellor*.

Mr. *Bethell* and Mr. *Rasch*, for the Plaintiff, after advert-
ing to the several books of account kept by the administrator, *E. Allfrey*, relating to the intestate's estate and effects, and pointing out instances of untrue entries made therein, and of the omission of entries which ought to have been made therein by the administrator, some of which have been already mentioned, contended that the same amounted to a case of fraud, and that the Plaintiff was entitled to have the settlement of accounts set aside, and a new account taken of the estate and effects of the intestate received by the administrator, and not merely liberty to surcharge and falsify the accounts of the administrator; that the Court could have no confidence in the accounts made out in the manner the present accounts were—there being classes of errors, and some of them attended with such particularity of detail, that it was impossible they could be pronounced to be matter of simple error or accidental omission; that much important information relative to the accounts was wanting, and was within

Argument.

CASES IN CHANCERY.

1849.
 ALLFREY
 v.
 ALLFREY.
 —
Argument.

the power of the Defendant *G. Allfrey's* solicitors, who were the solicitors of the administrator until his death, but the Defendant *G. Allfrey* had all along wilfully abstained from consulting those gentlemen relative thereto; that the memorandum signed by the Plaintiff, stating that he had had a satisfactory investigation of the accounts, on the very face of it evidenced falsehood; that, in a case like the present, where the errors were so numerous, it was the duty of the party charged to have explained the same, if he could have done so; that, with reference in particular to the stock transactions of the administrator, the entry in the accounts of the 20th May, 1808, of the produce of the sale of stock, was a pure fiction, there being no entry to be found in the accounts, previously to that period, of any dividends having been received by the administrator in respect of such stock; that, if there had been any purchase of stock by the administrator in the year 1808, it would have appeared in the books of the Bank of *England*, to which the Plaintiff could not, but the Defendant *G. Allfrey* could obtain access at any time; and that the false oath which was taken by the Plaintiff's uncle previously to procuring administration of the intestate's estate was taken with the view of his having the control of that estate, the proceeds whereof would necessarily be of great benefit, and the source of much profit to the administrator, who was a mercantile man. The cases of *Vernon v. Vawdry* (a), *Walker v. Symonds* (b), *Goldsmid v. Goldsmid* (c), *Executors of Earl of Lucan v. O'Malley* (d), *Brownell v. Brownell* (e), *Wedderburn v. Wedderburn* (f), were cited for the Plaintiff.

Mr. *J. Parker*, Mr. *Wood*, and Mr. *Hislop Clarke*, for the Defendants *G. Allfrey*, *Margaret Allfrey*, and *R. Allfrey*, contended that it was very improbable that the admini-

(a) 2 Atk. 119.
 (b) 3 Swanst. 73.
 (c) 1 Swanst. 211.

(d) 2 C. & L. 183.
 (e) 2 Bro. C. C. 62.
 (f) 2 Keen, 722.

strator *E. Allfrey* would have appointed the brother of the Plaintiff one of his executors, if he had really practised anything resembling fraud towards any member of that family ; that, although the Defendants had always admitted the existence of errors in the accounts, and had offered to let the accounts be taken on that admission, there was no pretence for saying that *E. Allfrey*, the administrator, had been guilty of fraud ; that the lapse of time (seventeen years) since the date of the settlement of the accounts was a material ingredient in the case, and sufficient of itself to disentitle the Plaintiff to any relief ; that, as regarded the stock sold out by the administrator, he considered it in the light of a loan of stock, and not of money, and the intestate's estate had had the advantage of compound interest in the accounts on the amount realised by the stock sold, from the year 1808, when a rest was made in the accounts, up to 1819, and it was not pretended that the intestate at his death possessed any public stocks, except the 9100*l.* Three per Cent. Reduced Annuities ; that ample justice would be done the Plaintiff by giving him leave to surcharge and falsify the accounts, as was done in *Millar v. Craig* (a) and *Brownell v. Brownell* (b) ; that it was no proof of fraud to say, you have debited me with a sum of money, as paid on a particular day, whereas, in truth, it was paid on another day ; that the errors in the accounts were not on one side only ; and that no case could be found in the books where accounts had been ordered to be opened after so long a lapse of time as had occurred in the present case, unless very strong circumstances of fraud were adduced. *Gregory v. Gregory* (c), and *Charter v. Trevelyan* (d), were cited.

Mr. *J. H. Law*, for *E. T. Allfrey* and *J. S. Allfrey*, took no part in the argument.

1849.
 ALLFREY
 v.
 ALLFREY.
 —
Argument.

(a) 6 Beav. 433.

(b) 2 Bro. C. C. 62.

(c) 2 Y. & C. 313.

(d) 11 C. & F. 714.

1849.

ALLFREY

v.

ALLFREY.

Judgment.Mr. *Bethell* replied.

The LORD CHANCELLOR:—

The only question in this cause is, whether the decree should be for an open account generally, or a decree to surcharge and falsify. The distinction between these two modes has not been very accurately observed in some recent cases; but in the earlier cases the distinction is clearly pointed out, and in *Vernon v. Vawdry* (a), the rule is laid down as follows:—"If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify; but if it is apparent to the Court that there has been fraud and imposition, the decree must be that the whole shall be opened, notwithstanding it was a stated account of twenty-three years' standing; and Mr. *Richard Vernon*, who was guilty of the fraud, is dead likewise." I acted upon that doctrine in affirming a decree of Lord *Langdale* in the case of *Wedderburn v. Wedderburn* (b). Now, it is quite obvious, that that is, strictly speaking, the doctrine and principle of the Court; because, if a transaction, whether it be a deed, or an agreement, or an account stated and settled, (which is only an agreement), be proved to be fraudulent, there is nothing on which the transaction can stand. It is itself void. Then, if the transaction itself be void, there is no question which can remain about an account partially settled, or settled except so far as error may be proved. In principle, therefore, no doubt, the rule there laid down is the correct rule.

But in some modern cases, a different rule seems to have been acted on, and particularly in the case which was referred to of *Brownell v. Brownell* (c), before Lord *Kenyon*. That was a case of fraud. An account had been settled

(a) 2 Atk. 119.

(b) 2 Keen, 722; 4 My. & Cr. 41.

(c) 2 Bro. C. C. 62.

between two brothers, both of whom were interested in certain ships, under their father's will; and the elder brother had certainly grossly misrepresented the interest of the younger brother when he procured him to settle an account. But Lord *Kenyon*, considering the great length of time which had elapsed since the account was settled, and considering that there might be great hardship on a party called upon to go through an account, and to prove the items of it at a very great distance of time, and therefore that great injustice might ultimately be done by having the account entirely opened, only made a decree to surcharge and falsify. No doubt that has been acted upon in more modern cases; as, for instance, in *Millar v. Craig (a)*, where the facts were undoubtedly sufficient to justify a general decree for an open account. But the *Master of the Rolls* thought that justice might be done to the parties by making a decree merely to surcharge and falsify; and if the Court, under the circumstances, sees that justice is more likely to be done by that form of decree than by a general decree for an open account, the Court is undoubtedly justified in taking that course which appears, under the circumstances, most likely to effect justice between the parties.

If, however, there be a balance—if it be a question whether the one party is likely to suffer injustice more from one form of decree than the other party from the other form of decree, then there can be no doubt that the Court ought to lean towards the side of an innocent and an injured party, rather than to the side of the offending party. It is impossible to say, that, going through an open account of long standing, which the party has not for many years past expected to be required to do, may not expose the party to very great hardship, and that he may not find it impossible to exonerate himself from certain obvious charges

(a) 6 Beav. 433.

1849.
 ALLFREY
 v.
 ALLFREY.
 Judgment.

1849.
ALLFREY
v.
ALLFREY.
—
Judgment.

which may be made against him, and which he must be subject to until he can relieve himself from them by evidence. On the other hand, it is quite obvious that if the party injured merely obtains permission to surcharge and falsify, it may be utterly impossible for him to discover what the fraud was or what the error was. He was a stranger altogether to the transaction, and only knows it as it was falsely represented to him by the party who was guilty of the fraud ; and, therefore, it would be in vain to tell him, " If you can point out an error, it shall be corrected," for that is exactly the difficulty under which he labours. He is ignorant of the transaction, and yet he is called upon to prove and substantiate an error. It is impossible, therefore, to be sure, that, either in the one form of account or the other, absolute justice will be done after the lapse of a great number of years ; but the Court will lean in favour of the innocent and injured party, and against that party who is the author of the fraud.

In the present case there is no question about the fraud ; and, without going through any great number of the instances of fraud, the one with regard to the stock is perfectly conclusive. First of all there was the signing the memorandum, which was in the handwriting, it is true, of the younger brother ; but it is quite obvious that it must have been signed under the dictation of the party who took the benefit of that memorandum. The Plaintiff signed a memorandum, which stated that he had had a satisfactory investigation of the foregoing accounts and of the administrator's general accounts of the effects of the Plaintiff's parent, both parties claiming under the parent, but the uncle having obtained administration in a most improper manner (and this must never be forgotten), and unjustifiably, and having thus become trustee for the family of the intestate. What the Defendant sets up as a bar to the Plaintiff's relief when he asks for an account of his father's

estate, is, that the youngest son, about two years after he became of age, signed a memorandum, stating that he had had a satisfactory investigation of the foregoing accounts and of the administrator's general accounts of the effects of his parent. Now, it is that very account which contains the fraud. Well, then, according to the facts as they stand, what is it that constitutes a settlement, and where is the bar to the Plaintiff to prevent him from having the relief which he prays? Is that statement true? Is that a satisfactory account? Could the son have had a satisfactory investigation of that account; or could he have had a satisfactory investigation of the administrator's account of the effects of his parent? Why, the following fact (and one fact is quite sufficient for the present purpose,) appears on that account, coupled now with the admitted fact, which is not to be found in that account, that the father left a sum of 9100*l.*, Three per Cent. Stock. It is now not in dispute,—it is either admitted or so clearly proved that no contest is raised at the bar on the subject,—that, in the year 1802, this brother of the intestate, having obtained administration in the manner I have already described, sold out 4000*l.*, part of that stock, and, shortly afterwards, had the rest of that stock transferred into his own name. Of that transaction not a vestige is to be found in the account of which this young man states that he had had a satisfactory investigation. But, in the year 1808, six years after this transaction, entries are made in the account as if the stock had been sold at that time, and other stock purchased.

But, the Plaintiff knew nothing and knows nothing now of these entries, except so far as they appear in the account. He has been desirous of ascertaining what the real transaction was, and has applied to the Bank of *England* for that purpose. The Bank return the obvious answer, that, it being the private account of his uncle, they are not in the habit of informing others of the state of an account, with-

1849.
 ALLFREY
 v.
 ALLFREY.
 —
Judgment.

1849.
 ALLFREY
 v.
 ALLFREY.
 —
Judgment.

out the leave of the party whose account it is, and that leave the Plaintiff has not been able to obtain. We therefore have these facts, viz. that there was a sale of 9100*l.* stock, or a transfer to the administrator, which is the same thing, of that portion of the intestate's estate in the year 1802; and no entry was made in the account of that transaction at the time when it occurred; and the account, therefore, is untrue as to that part of it. There is a wilful and culpable omission at that time; and, in the year 1808, there is an entry inconsistent with the facts, because it represents the stock so sold or transferred in 1802, as remaining in 1808. So far we know it to be untrue; because it is necessarily so from the fact which is proved as to the transaction in 1802. Whether any other stock was bought, when it was bought, or what the transactions were with regard to that stock,—none of these matters are before the Court; and they are prevented from being before the Court, by the interposition of those who now represent the uncle's estate. I say, then, we have, from this omission of what took place in 1802, and from a false entry in 1808, a misrepresentation,—a falsification of the real transaction,—and, therefore, a fraudulent statement of accounts, in respect of which the uncle induces the nephew to sign a memorandum that he had had a satisfactory investigation, as well as of the administrator's account of the parent's estate.

This account, therefore, or rather this memorandum, so proved to be untrue,—so proved to have been obtained by misrepresentation and fraud,—is, of necessity, set aside; and it is set aside on the well-established fact of a fraud having been practised by a personal representative who was also standing in the place of a parent, inasmuch as he had placed himself *in loco parentis* with regard to this family, consisting of his nephews and niece. He had acted as their uncle, and in many respects had acted kindly; but, by assuming the character of a person acting *in loco parentis*,

he had so far disqualified himself for settling these accounts as between himself and them. We have, therefore, a party acting *in loco parentis* exhibiting an untrue account, and procuring his nephew to sign it, the account representing that the nephew had had a satisfactory investigation of it. Why, on the face of the account he might have had a satisfactory investigation of it, because the account itself necessarily did not contain even a statement, and least of all a proof, of errors. Therefore, nobody could have discovered the fraud or the omission from the mere investigation of that account. But the nephew was deceived; the whole transaction had been mystified and misrepresented; and the young man who was entitled to have, as he states he had had, a satisfactory investigation of the administration account, as well as the account he signed, did it necessarily in ignorance of the fraud which had been practised upon him. That transaction, therefore, is most properly set aside by the decree.

1849.
 ALLFREY
 v.
 ALLFREY.
 —
Judgment.

Now, what possible security can the Court have, or can the Plaintiff have, that, in pursuing this inquiry, and endeavouring to shew in what other respects he may have been in a similar manner defrauded, the Plaintiff will be able—or what materials is he possessed of to enable him—to bring before the Master any other case of fraud? It may exist; it may be covered by some false entry; and, if he could find it out, and have the means of proving it, I have no doubt it might be rectified under a decree to surcharge and falsify. But is it not rather the duty of those who stand upon the account, and who represent the party who made the account, and who stand in the place of the author of the fraud, to prove the actual state of the account, of which no true statement whatever has yet been rendered, than to throw that burthen on the party who is complaining, and who may with justice complain, of his having been deceived and defrauded in the ostensible settlement

1849.
ALLFREY
v.
ALLFREY.
—
Judgment.

that took place? No doubt it may produce hardship—it is impossible to deny that—after the great length of time that has elapsed: I say nothing about that, because, when fraud is so distinctly established, time becomes perfectly immaterial, the Plaintiff not having had any means of discovering it, and not having, in fact, discovered it until a comparatively recent time. But, after a great length of time, difficulties may, beyond all doubt, occur in passing the accounts.

The *Master of the Rolls* has pursued a plan which has been adopted in a great many cases, and which, in a degree, applies a remedy to that possible evil which may emanate from a loss of documents or evidence, occasioned by the length of time. He has given the Master directions, that, if he finds a difficulty in taking the account, owing to the lapse of time or the loss of documents, he is to state specially the difficulty which he finds. The Court then, according to the facts which may appear on the Master's report, may be in a situation to apply such remedy and give such further directions as the circumstances of the case may appear to require. This, in a great degree, guards against the possibility of injustice being done, even to an offending party; and I think it affords all the security and all the remedy which the party so offending is entitled to, or can in justice be allowed, in a decree between himself and the party so defrauded.

I therefore approve of the *Master of the Rolls'* decree in every part, and dismiss this appeal, with costs.

1849.

RIDGWAY v. GRAY.

March 24th.

UNDER the decree made in this suit, directing sale of a testator's estates, *William Bradshaw*, on the 16th of April, 1847, became the purchaser, by public auction, of Lot 1, which, in the particulars of sale, was described as freehold property, consisting of stacks of warehouses let on lease to, and in the occupation of, Messrs. *Booth & Son*, for a term of twenty-one years from the 25th of December, 1843, determinable at the end of the 3rd, 7th, or 14th year of the term, at a rent of 120*l.* per annum, clear of all tithes, land-tax, and sewers-rate. Before the completion of the purchase, it was discovered that the premises had been demised to one *Charles Speare Tosswill* for the said term of twenty-one years, and had been assigned by him, for the residue thereof, to *Robert Booth* the elder, alone, and that the said Messrs. *Booth & Son* were not such joint lessees as in the conditions of sale stated, although they were in the joint occupation of the demised premises. The 8th condition of sale provided for compensation in case any error or misdescription should be found in the particulars of sale. On motion by the Plaintiffs, on the 31st of July, 1847, before the *Vice-Chancellor of England*, that the purchaser might be ordered to pay his purchase-money and interest into court, a reference was directed to the Master, to inquire and state whether *William Bradshaw* was entitled to any and what compensation in respect of the misdescription in the particulars of sale. None of the Defendants to the suit were present at the hearing of the motion, or served with notice thereof, or of the order made thereon. The Master, by his report, dated the 12th July, 1848, certified that, under the circumstances of the case, he was of opinion, that the purchaser was entitled to a compensation, in respect of the misdescription in the particulars of sale, of 240*l.*, being the amount of two years' rent

One of the conditions of sale, under a decree, was, that in case of misdescription in the particulars of sale, the purchaser should accept compensation:—The Court intimated that a purchaser could not be compelled to accept compensation where the particulars of sale described the property purchased, as "let on lease for twenty-one years to, and in the occupation of, B. & Son," the fact being that the property had been demised for twenty-one years to T., and had been assigned by him, for the residue of the term, to B. alone, one of the firm of B. & Son, who were the joint occupants thereof. And also, that the Court had no power to compel the purchaser to accept an indemnity in such a case.

1849.
 RIDGWAY
 v.
 GRAY.
 ———
Statement.

reserved by the lease. The Plaintiffs having declined to except to the report, exceptions were taken thereto by the Defendant *Gray*, on the ground that the purchaser was not entitled to any compensation, or, if he were entitled to compensation, he was entitled to considerably less than 240*l*. The exceptions came on to be heard before the *Vice-Chancellor of England*, when his Honor ordered the same to be overruled. From that order the Defendant *Gray* appealed, and, by his petition of appeal, insisted that the order of the 31st of July, 1847, was irregular, on account of the same having been made in the absence of all the Defendants to the suit, and without notice to them, or any of them, and that the same was likewise erroneous on the merits.

Argument.

Mr. *Rolt* and Mr. *Prendergast*, in support of the appeal, contended that the case was not one of compensation, there being no data on which to proceed for the purpose of ascertaining the amount of compensation, but rather a case for indemnity (*a*), and that the Appellant at least, who was the executor named in the testator's will, ought to have been served with the notice of motion, requiring the purchaser to pay his purchase-money into court.

Mr. *Bacon* and Mr. *Chandless*, on behalf of the purchaser, objected to take any indemnity, and insisted on his being either allowed the amount of compensation found by the Master, or wholly discharged from his purchase, with costs: *Balmanno v. Lumley* (*b*).

Mr. *J. Parker*, for the Plaintiffs, did not take any part in the argument.

(*a*) *Milligan v. Cooke*, 16 Ves. 1; *Morris v. Preston*, 7 Ves. 547, and 1 Sugd. Vend. and Purch. p. 495, 10th ed. Vide also the fol-

lowing cases: *Campbell v. Hay*, 2 Molloy, 102; and *Burnell v. Brown*, 1 J. & W. 168.

(*b*) 1 V. & B. 224.

The LORD CHANCELLOR, after stating that he could not see how the purchaser could compel the vendor to give compensation in respect of the misdescription, and that he had no power to compel the purchaser to be satisfied with an indemnity, held, that the order of the Court below was wrong in directing a reference to ascertain the amount of compensation in the absence of the Appellant, and must be discharged, any of the parties being at liberty to make such application to the Court below as they might think proper.

1849.
 RIDGWAY
 v.
 GRAY.
 Judgment.

RAINCOCK v. YOUNG.

April 20th.

THE Plaintiff filed his original bill in the year 1846, and in January, 1847, a bill of revivor and supplement, seeking to restrain the Defendants from issuing execution against the Plaintiff on a judgment obtained by them in an action on a bond. The common injunction was obtained by the Plaintiff, for want of answer, in February, 1847. On the 26th of April, in the same year, the Defendants put in their answer, and in September following, replication was filed by the Plaintiff, and a subpoena was afterwards served on the Defendants to hear judgment. The action was tried at the Summer Assizes of 1847 for the county of *Suffolk*, when the Defendants obtained a verdict. On the 14th of March, 1849, the *Vice-Chancellor of England* refused, with costs, the Defendants' motion seeking payment by the Plaintiff into court of the amount of damages and costs recovered in the action at law, or, in default of such payment, the dissolution of the existing injunction. The ground of the refusal of the motion, was the fact of no order *nisi* having been previously obtained by the Defendants. From that order the Defendants now appealed.

The established practice, which requires the common injunction to be dissolved by the usual order *nisi* and order absolute, is not affected by the fact that the time allowed by the rules of the Court for taking exceptions to the answer has elapsed.

The case of *Bishton v. Birch*, 2 V. & B. 40, considered and explained.

Statement.

1849.
 RAINCOCK
 v.
 YOUNG.
 —
Argument.

Mr. *Stuart* and Mr. *Haldane* in support of the appeal:—

Where an answer is to be deemed sufficient, (as in the present case,) an order *nisi* need not be obtained by the Defendants, inasmuch as nothing but merits disclosed by the answer can be shewn by the Plaintiff, in answer to a motion to dissolve an injunction staying execution.

[The LORD CHANCELLOR, after Mr. *Stuart* had read the observations of Lord *Eldon*, in *Lacy v. Hornby* (a), observed, that, in the case then before him, the Defendants contended, that, in all cases where the answer was to be deemed sufficient, the motion to dissolve must be a special one, however clear the case might be; whereas, if the Defendants merely obtained an order *nisi*, and the Plaintiff did not appear thereon, the Defendants took their order as of course.]

But if the time that has elapsed makes the answer clearly sufficient, there can be no use in the order *nisi*.

[The cases of *Sharpley v. Perring* (b), and *Philips v. Langhorn* (c), were then cited, and the observations of Lord *Eldon*, in *Bishton v. Birch* (d), were also read. They also referred to *Sherwood v. White* (e), and *Acton v. Market* (f), where the Court ordered the sums recovered in the actions to be brought into court by the Plaintiffs, or the injunction obtained for want of answer to be dissolved, no order *nisi* having been previously obtained in those cases. The case of *Culley v. Hickling* (g) was also mentioned in support of the motion.]

(a) 2 V. & B. 291.

(b) 8 Sim. 600.

(c) 1 Dick. 148.

(d) V. & B. 40.

(e) 1 Bro. C. C. 452.

(f) 2 Id. 14.

(g) Id. 182.

[The LORD CHANCELLOR.—In those cases the applications were made by the Defendants before answer, and they are therefore not applicable to the present one.]

1849.
RAINCOCK
v.
YOUNG.
— —
Argument.

Mr. *James Parker* and Mr. *Hardy* for the Plaintiff:—

There are two objections to the motion, one of which has been stated; and the other is, that the cause is now ripe for hearing, (the subpoena to hear judgment having been served,) and at a stage at which the Defendants cannot ask to have the injunction dissolved (*a*). The Plaintiff has, in a case like this, three courses open to him; 1st, he may appear and shew cause on the merits, on the order *nisi* being applied for; 2ndly, he may except to the answer; 3rdly, he may allow the injunction to dissolve itself, by not appearing on the order *nisi*. For the purpose of dissolving the common injunction, the rule is imperative where there is an answer filed; that is, you must first obtain the order *nisi*, and afterwards confirm the same by order absolute (*b*), the notice of motion for an order *nisi* being a kind of privilege, allowing the Plaintiff to adduce his reasons against the dissolution of the injunction.

[The LORD CHANCELLOR.—Formerly, no one could say when a Defendant's answer was to be deemed sufficient; but it is otherwise now, when the time is settled within which the Plaintiff must take his exceptions.]

In the case of *Lacy v. Hornby*, there had been an order *nisi* made, which was rendered ineffective by the subsequent proceedings touching the impertinence, taken by the Plaintiff; and, as to *Bishton v. Birch*, it may fairly be inferred from the report of that case, that an order *nisi*

(*a*) *Feistel v. King's College*, 10 Beav. 496; *Barnett v. Mole*, 1 Keen, 645. (*b*) Gilb. For. Rom. 196; Wyatt's Pract. Reg. 235.

1849.
 RAINCOCK
 v.
 YOUNG.
 —
Argument.

had at one time existed: Newland's Chancery Practice, vol. 1, p. 349; Smith's Chancery Practice, vol. 1, p. 778 [*Naylor v. Middleton* (a), and *Molineux v. Luard* (b), were also referred to on behalf of the Plaintiff.]

Mr. *Stuart* replied.

Judgment. The LORD CHANCELLOR:—

One only of the points argued is material in this case. It startled me to hear the proposition made, that after the time had elapsed for excepting to the answer, a special motion was necessary for the purpose of obtaining a dissolution of the common injunction. The regular practice of the Court in cases like the present is, that when the Defendant's answer has been filed, he obtains an order *nisi*, when, if the Plaintiff shews no cause, the injunction is gone; if he shews exceptions for cause, and the Master's report is against him, the injunction also goes; and it is the same if cause is shewn on the merits and facts. The common injunction having been obtained by the Plaintiff, is retained by him until answer filed and further order; and the Plaintiff can shew, by exceptions taken to the answer, that the Defendant has not answered the bill, or he may shew cause on the merits. It is then said, on behalf of the Defendants, that there is authority against that course of proceeding, which determines that where the answer is sufficient, the time allowed for the Plaintiff's excepting thereto having expired, the course is to move to dissolve the injunction at once on special motion. If any such authority really existed, it would be useless discussing the matter; but the cases cited on behalf of the Defendants do not bear out the proposition. The case of *Lacy v*

(a) 2 Madd. 131.

(b) 2 Dick. 684.

Hornby (a) is no authority for the Defendants, because there an order *nisi* clearly appears to have been obtained. *Bish-ton v. Birch* (b), however, is relied on for the Defendants; but it appears to me, from the expressions used in that case by Lord *Eldon*, that an order *nisi* had been at one time obtained by the Defendant; exceptions had been taken to the answer; the answer had been reported sufficient, and exceptions to the Master's report had been submitted to. An order had been made also to extend the injunction to stay trial; and his Lordship says, "If the injunction is gone by the report that the answer is sufficient, the injunction, as extended to stay trial, must be gone also;" his Lordship's observations in that case principally applying to the circumstance of the injunction having been extended to stay trial, but he did not determine, in that case, that an order *nisi* was not necessary. That case, as reported, is complicated and confused, but there had been clearly an order *nisi* made in it; and it is, therefore, no authority for the present application. The practice as I have stated it, seems to have been the practice recognised by the *Master of the Rolls*, the *Vice-Chancellor of England*, and Vice-Chancellor *Knight Bruce*, and I cannot alter the practice so established upon expressions used by Lord *Eldon*, in a report where the real case before his Lordship did not raise the point.

1849.
 RAINOLD J.
 v.
 YOUNG.
 Judgment.

Motion refused.

(a) 2 V. & B. 291.

(b) 2 V. & B. 40.



1849.

*April 4th.**In re WADE.*

Notwithstanding the provisions contained in the Land-tax Redemption Act (42 Geo. 3, c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the *Lord Chancellor* before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising monies wherewith to redeem the land-tax.

Statement.

UNDER the impression that it was not necessary for the committees of the lunatic to have the previous sanction of the *Lord Chancellor*, under the Act 42 Geo. 3, c. 116 (a), to the sale of a sufficient part of the lunatic's estate, with a view to the redemption of the land-tax charged thereon, and that they were acting in strict accordance with the provisions of the Act, a sale was made in June, 1847, by public auction, by the committees of the lunatic, of a piece of freehold land, part of the lunatic's estate, at the price of 600*l.*, under the authority, and with the consent and approbation of the Land-tax Commissioners, who have power by the Act to prevent improvident sales, to examine witnesses on oath, and to protect any surplus monies, by the transfer thereof to the *Accountant-General* of the Court of Chancery, in the matter of the lunacy.

The *Lord Chancellor*, on the occasion of an application to his Lordship in this matter, on the 15th of April, 1848, made an order, referring it to one of the Masters in Lunacy to inquire and certify (amongst other things) whether it was for the benefit of the lunatic's estate that a sale of land should have been made for the purpose of discharging the land-tax thereon, and expedient that so much land should have been sold, as had been sold, for the redemption of such land-tax.

The Master, by his report, found that it was for the benefit of the lunatic's estate that a sale of land should have been made for the purpose of discharging the land-tax, except that he humbly submitted to the *Lord Chan-*

(a) Vide sects. 14 and 53.

cellor's judgment, whether such sale should have been made without his Lordship's sanction having been in the first instance obtained for that purpose; and he further found, that there was no sufficient evidence to satisfy him that it was expedient that so much land should have been sold, as was sold for the redemption of such land-tax; but he was of opinion, having regard to the circumstances mentioned in his report, and to the nature and situation of the piece of land so sold, that no portion of the lunatic's estate was so well adapted to be sold for the purpose required, as the said piece of land.

Mr. *James Parker* and Mr. *W. M. James* now appeared in support of a petition to confirm the Master's report.

The LORD CHANCELLOR made an order to that effect, and, at the same time, intimated his opinion, that, notwithstanding the provisions contained in the Land-tax Redemption Act, it was the duty of the committee of a lunatic, before proceeding to a sale of any part of a lunatic's estate, with a view to the redemption of land-tax, to obtain the sanction and directions of the *Lord Chancellor* on the subject.

1849.
In re WADE.
Statement.

Judgment.

1849.

Feb. 14th.

In re THE SHREWSBURY MUNICIPAL CHARITIES,
AND *In re* THE GOVERNORS AND TRUSTEES OF
THE FREE GRAMMAR SCHOOL AT SHREWS-
BURY.

The Court does not act on its own knowledge of the fitness of parties named in a petition seeking the appointment of new trustees in the room of deceased trustees of charities, but makes the usual reference to the Master.

Where a party set up an unfounded claim, and in consequence of such claim was served with a petition, the Court declined making any order as to his costs.

On a petition seeking a reference for the appointment of new trustees in the room of deceased trustees of corporation charities, the Court declined giving any directions for any attendance on behalf of the corporation before the Master.

MR. ROLT appeared in support of a petition of nine of the surviving trustees of the municipal charities of the borough of *Shrewsbury*, praying a reference to the Master to appoint proper persons to be trustees of those charities, and also of certain ecclesiastical benefices, formerly vested in the mayor, aldermen, and assistants of the borough of *Shrewsbury*, for the benefit of the Free Grammar School there, in the place of the deceased trustees. The number of trustees appointed by the Master, in 1837, of the municipal charities, was seventeen, and of the ecclesiastical benefices, five. Of the former number five had died, one other was resident abroad, and another, owing to extreme deafness, had for some time past seldom attended the meetings of the trustees; and of the latter, two had died, viz the Bishop of *Lichfield* and Earl of *Powis*.

The *Solicitor-General* and Mr. *Kenyon* appeared to oppose that petition, so far as respected the appointment of new trustees of the ecclesiastical benefices, and also in support of a petition of the surviving governors and trustees of the Free Grammar School, praying the appointment (without a previous reference to the Master) of the present Earl of *Powis* and Bishop of *Lichfield*, as trustees of the ecclesiastical benefices, in the room of the late Earl of *Powis* and Bishop of *Lichfield*, the surviving trustees consenting; or that the usual reference might be directed to the Master generally to appoint new trustees, in the room of the two deceased trustees; and they insisted that

1849.

In re THE
SHREWSBURY
MUNICIPAL
CHARITIES,
AND *In re* THE
GOVERNORS
AND TRUSTEES
OF THE FREE
GRAMMAR
SCHOOL AT
SHREWSBURY.

Argument.

the Petitioners, named in the other petition, ought to have confined their petition to the appointment of trustees, in the place of the deceased trustees of the municipal charities, some of those Petitioners and also the corporation having, on the 1st of January, 1849, previously to the presentation of their petition, received notice from the solicitor of the surviving governors and trustees of the Free Grammar School, that they had directed a petition to be presented on their behalf, seeking the appointment of new trustees of the ecclesiastical benefices, in the room of the deceased trustees; and they referred to the case of *The Worcester Charities* (a), and *The Matter of the Free Grammar School at Shrewsbury* (b).

At a meeting of the corporation, on the 12th of January, 1849, a resolution was passed, authorising a petition to be presented to the *Lord Chancellor*, seeking the appointment of new trustees, in the room of the deceased trustees of the ecclesiastical benefices.

Mr. *Bacon* and Mr. *Wray* appeared for the corporation of *Shrewsbury*, who had been served with the petition of the surviving trustees of the ecclesiastical benefices, and asked to be allowed to go before the Master, with reference to the appointment of the new trustees; and also asked for the costs of their appearance on the petition with which the corporation had been served. They suggested that the only way in which the sons of burgesses of the borough, who were the proper persons to be nominated and inducted into the livings, could be represented before the Master, would be through the corporation, who ought, therefore, to be permitted to attend the Master on the order of reference.

(a) 2 Ph. 284.

(b) 1 My. & Cr. 649.

1849.

In re THE
SHREWSBURY
MUNICIPAL
CHARITIES,
AND *In re* THE
GOVERNORS
AND TRUSTEES
OF THE FREE
GRAMMAR
SCHOOL AT
SHREWSBURY.

—
Judgment.

THE LORD CHANCELLOR observed, that on the former occasion, in 1836 (*a*), it was very proper that the corporation should be before the Master, inasmuch as it had the custody of the muniments of title belonging to the various charities of the borough; but that, as to the trustees of the ecclesiastical benefices, they were totally distinct persons from the corporation, and their trusts ought not to be interfered with by that body; that, although the sons of the burgesses of the borough of *Shrewsbury* might be favoured objects with reference to the ecclesiastical benefices, they had not been served with the petition of the trustees, and could not, therefore, be heard.

Orders were accordingly made by the *Lord Chancellor* for references to the Master on the two petitions, for the appointment of new trustees of the municipal charities and the ecclesiastical benefices respectively—his Lordship stating, that he could not act on his own knowledge of the Bishop of *Lichfield* and Earl of *Powis* being proper persons to be the new trustees of the ecclesiastical benefices.

No order was made by his Lordship, under the circumstances of the case, as to the corporation, who had been served with the petition of the surviving trustees of the ecclesiastical benefices.

(*a*) Vide 1 My. & Cr. 632.

1849.

PEILE v. STODDART.

April 20th.

IN December, 1848, the Defendant, who, previously to August, 1845, had been the second master of a free grammar school, brought an action at law against the Plaintiff, the head master, for recovery of damages for the non-performance of a contract made by the Plaintiff with the Defendant, in August 1845, to pay to the Defendant a yearly sum of 100*l.* for seven years. The Plaintiff, in Hilary Term, 1849, filed his bill of discovery against the Defendant, seeking an injunction in the mean time against further proceedings in the action. The Plaintiff by his bill alleged, that, from charitable motives only, he was induced to contribute to the maintenance and support of the Defendant and his family; and that, so long as the Defendant remained without further employment or addition to his then income, he allowed the Defendant gratuitously, and as a bounty to the Defendant, a yearly sum of 100*l.* That, since August, 1845, the Plaintiff had made quarterly payments of 25*l.* to the Defendant, amounting to 275*l.* altogether; and that the Defendant having, during the year 1848, obtained employment of considerable value, the Plaintiff refused to make any further payment to the Defendant. The bill then alleged, that, previously to the time when the Plaintiff made the first quarterly payment of the allowance of 100*l.*, and subsequently, on several occasions, various letters had passed between the Plaintiff and Defendant relative to the allowance of the 100*l.* per annum, and the payment or non-payment thereof by the Plaintiff to the Defendant; and that the Plaintiff had frequently, by himself and his agents, applied to and requested the Defendant to set forth the particulars of such letters in any manner relating to the various payments or non-payment of the said

The Defendant in his answer to a bill seeking discovery in aid of the Plaintiff's defence to an action at law, brought by the Defendant against him, stated that the letters, papers, and writings scheduled to his answer, contained the evidence on which the Defendant was advised and intended to rely at the trial of the action, and that the same did not, nor did any of them, "as the Defendant was advised and verily believed," contain any evidence whatever in support of the Plaintiff's pleas in the action; and that the same were not in any manner material to the Plaintiff's case:—*Held*, that the statement was a sufficient answer to the Plaintiff's motion for production and

inspection of the scheduled documents.

1849.
PEILE
v.
STODDART.
—
Statement.

allowance of 100*l.* per annum to the Defendant; and also, to produce to the Plaintiff all documents relating to the matters in question in his possession, or copies thereof. The bill then charged, that the Defendant had in his possession, or power, divers letters, copies of letters, papers, and writings, relating to the matters mentioned in the bill, and that, if the same were produced, the truth of the matters in the bill mentioned would appear, but that the Defendant refused to produce the same; and that, without discovery of the matters aforesaid, the Plaintiff was unable to defend the action.

The common injunction having been extended to stay trial, the Defendant put in his answer, by which he denied the allegations in the bill as to the terms of the allowance of 100*l.* a-year to the Defendant, and stated that the Plaintiff's offer (which was accepted by the Defendant), was to pay to the Defendant 100*l.* a-year for seven years, if the Plaintiff so long lived, on condition that the Defendant immediately quitted his official residence. The Defendant admitted, by his answer, that he had in his possession or power several letters, papers, and writings relating to the matters in the bill mentioned; and he had, in the schedule to his answer, set forth a list of all such letters, papers, and writings, but he denied that thereby or otherwise, if the same were produced, the truth of the matters in the bill mentioned, or any of them, would appear, further than as the same was thereinbefore admitted. The Defendant then stated that such of the letters, papers, and writings as were set forth in the first part of the schedule to his answer were of great importance to the claim made by the Defendant in his action, and were, or contained, the evidence on which the Defendant was advised, and intended mainly to rely at the trial of the action; and that the letters, papers, and writings, as well those in the second and third parts, as those in the first

part of the schedule, or any of them, did not, as the Defendant *was advised and verily believed*, contain any evidence whatever in support of, or tending to support, the Plaintiff's pleas in the action, or any of them, and were not in any manner material to the Plaintiff's case; and that the Plaintiff had not, as the Defendant was advised and verily believed, any right or title to the production of, or any interest whatever in, the letters, papers, and writings in the schedule mentioned, or any of them; and he submitted whether he ought to be compelled to produce the said letters, papers, and writings, or any of them. The first part of the schedule consisted of letters and copies of letters that had passed between the Plaintiff and Defendant and their respective solicitors and agents, and also of letters from the solicitor of the governors of the school to the Defendant.

1849.
 PRILE
 v.
 STODDART.
 —
Statement.

And the Defendant in his answer stated, that, on the hearing of a summons, issued by the Plaintiff, seeking inspection of the contract in writing mentioned in the declaration, before Mr. Baron *Rolfe*, the same was dismissed, on the ground that the letters that had passed between the Plaintiff and Defendant were the only evidence of contract of the Plaintiff at law, and that the Defendant at law had no right to an inspection thereof. On application to the *Vice-Chancellor of England*, an order was made by his Honor, directing the production of the letters, and copies of letters, set forth in the first part of the schedule to the answer. From that order the Defendant appealed.

Mr. *Stuart* and Mr. *Busk*, in support of the appeal:—

Argument.

This order, which followed the decision of the *Vice-Chancellor*, in *Bannatyne v. Leader (a)*, a case materially

(a) 10 Sim. 230.

VOL. I.

P

L. C.

1849.
 PEILE
 v.
 STODDART.
 ———
Argument.

different from the present, cannot be supported ; one letter written by the solicitor of the governors of the school, of which the Defendant was one of the masters, to the Defendant's solicitor, and having reference to a transaction which led to the agreement of the Plaintiff to pay the annuity of 100*l.* to the Defendant, is no where charged by the bill to be material to the Plaintiff's case: indeed, the bill contains no charges that any of the papers set forth in the schedule are material to the Plaintiff's case at law; there is merely the ordinary charge in the bill, of the Defendant having in his possession letters, papers, and writings relating to the matters in the bill mentioned, and that, without discovery thereof, the Plaintiff would be unable to defend the action. In the Court below it was objected, that the Defendant did not in his answer state positively, but only that he *was advised and verily believed* that the scheduled letters, papers, and writings did not contain any evidence in support of the Plaintiff's pleas in the action, and were not material to his case; but in truth, the circumstance of the Defendant having been advised by a competent party, and also stating his positive belief as to a fact, is more satisfactory than a mere positive denial by the Defendant, and nothing more.

The observations in the *Lord Chancellor's* judgment, in the case of *Bolton v. Corporation of Liverpool* (a), were referred to in support of the application.

Mr. *Follett*, contra:—

There are letters set forth in the schedule to the answer, as, for instance, those from Mr. *Mousley*, the solicitor of the governors of the school, to the Defendant's solicitor, which may have a material bearing on the Plaintiff's case at law, and no observation, except the general one, is

(a) 1 My. & K. 88.

made relative thereto in the Defendant's answer, and they ought therefore to be produced.

1849.
PEILE
v.
STODDART.
—
Argument.

[The LORD CHANCELLOR.—Do you insist on production of the letters written by the Plaintiff to the Defendant, your object being to resist the Defendant's demand?]

The Plaintiff says the contract was only a conditional one, and not absolute, for the payment of the annuity, as alleged by the Defendant, and that evidence of that fact is disclosed by some of those letters.

[The LORD CHANCELLOR.—The question at law will be one of contract or no contract, and neither party can use his own letters to prove his case, but the Defendant's letters will be evidence for the Plaintiff at law.]

The Defendant's statement in his answer is, that the letters do not contain evidence in support of the pleas in the action, which is not satisfactory, inasmuch as the pleas may be amended: as regards the Defendant having been advised on the subject of the materiality of the scheduled papers, he may have been advised by a person incompetent to give him advice, and as his belief on the subject refers to the advice given him, it cannot be entitled to the same weight with the Court as a distinct averment and positive denial by the Defendant.

The cases of *Storey v. Lord George Lennox* (a), and *Smith v. The Duke of Beaufort* (b), were referred to on behalf of the Plaintiff.

The LORD CHANCELLOR here expressed his opinion that no order ought to be made for production of the letters from the Plaintiff to the Defendant.

(a) 1 My. & Cr. 523.

(b) 1 Ph. 209.

1849.

PEILE
v.
STODDART.

Judgment.

Mr. *Stuart* replied.

The LORD CHANCELLOR, after observing that the expression used by the Defendant in his answer was, not that he had been advised, and *therefore* believed, the belief being the result of the advice, but that he had been advised, and verily believed, said, he thought the scheduled letters and papers were sufficiently protected by the form of denial used by the Defendant in his answer, and that the order of the Court below must therefore be discharged. His Lordship added, that probably the scheduled documents, other than the letters from the Plaintiff to the Defendant, might be reached by amendment.

March 23rd &
April 27th.

In re MORGAN.

The Act 1 Will. 4, c. 65, does not render it imperative on the Lord Chancellor, on the application of a *curator bonis* of a lunatic appointed by the Court of Session in Scotland, to order a transfer of stock standing in the lunatic's name in the Bank of England, (the property of the lunatic,) into the curator's name.

AN application was made to the *Lord Chancellor*, on the 28th of January last, on the petition of the *curator bonis* of the lunatic, who resided in *Edinburgh*, praying the transfer of a sum of 90,067*l.* 18*s.* Three and a Quarter per Cent. Bank Annuities, standing in the books of the Bank of *England* in the lunatic's name, into the name of the *curator bonis*, and that *John Butler*, one of the clerks in the Bank of *England*, might be directed to receive the dividends due and to grow due thereon previously to such transfer being made; but the *Lord Chancellor* declined to make the order, on the ground that the Act 1 Will. IV, c. 65,

The *Lord Chancellor* will order payment by the Bank to the *curator bonis*, of the past dividends due on the stock, but not future dividends.

was not imperative (a), but left it in his Lordship's discretion to grant or refuse the application; his Lordship not being satisfied that the security taken by the Court of Session in *Scotland* from the *curator bonis* was sufficient, the petition stood over, and on the 23rd March was again mentioned by Mr. *Rolt* and Mr. *Sidebottom*, on behalf of the Petitioner, when the *Lord Chancellor* made an order, appointing the proper officer of the Bank of *England* to receive the present and future dividends on the 90,067*l.* 18*s.* Three and a Quarter per Cent. Bank Annuities, and to pay them over from time to time, during the life of the lunatic, to the *curator bonis*.

1849.
In re
MORGAN.

On drawing up the order, a difficulty arose with reference to the Bank, its officers declining to receive evidence from time to time of the lunatic being alive, and of the continuance of the lunacy. The same difficulty arose in *The matter of Elias* (b), where it was desired to obtain a prospective order for payment of dividends, as in the present case; and the order there finally made was confined to past dividends.

The order subsequently drawn up in the present case was accordingly limited to the one year's dividends, less the property-tax due on the 5th of April last past.

(a) Vide sects. 33, 34.

(b) Not reported.

1849.

March 9th.

Ex parte KENT, *In re* PETER MOORE, a Lunatic.

An order, in the nature of a stop-order, to prevent a transfer without notice, of funds in court belonging to a lunatic, granted on the application of the mortgagee of the lunatic's next of kin.

A PETITION was presented by *John Kent*, in which he stated, that *George Henry Moore* being, as next of kin of the lunatic, entitled in expectancy, on the lunatic's decease, to funds in court in the lunacy, assigned his interest therein to *Cynric Lloyd*, for securing 4000*l.* This mortgage was afterwards assigned to and was then vested in the Petitioner, who prayed that no part of the funds in court in the lunacy, or the accumulations, might be sold or disposed of, except upon the application of the committee, without notice to the Petitioner.

Mr. *Wright* appeared for the Petitioner, and

Mr. *Craig* for *George Henry Moore*.

The assignments were produced, and affidavits filed, verifying the due execution of them. A case, *In re Alchin*, 1825, before Lord *Eldon* (a), having been handed up by the Secretary of Lunatics, in which an order, in the terms now prayed, had been made under similar circumstances, the Lord Chancellor granted the order upon the authority of that case.

1825.

August 6th.

(a) *In re* FRANCES ALCHIN, a Lunatic.

SAMUEL SCHOLEY presented a petition, stating, that *Thankful Willinet* and *Harriott* his wife, in right of the said *Harriott*, were contingently entitled to 1881*l.* 13*s.* 7*d.* Consols, standing, in the name of the *Accountant-General*, to the account of the lunatic, and to all accumulations, in the event

of the lunatic dying intestate in the lifetime of Mrs. *Willinet*, she being the sister and only next of kin of the lunatic; and that the Petitioner had purchased of Mr. and Mrs. *Willinet* their contingent reversionary interest in the said stock and accumulations; and the Petitioner prayed that

the *Accountant-General* might be restrained from transferring, unless on the application of the committee for the time being, any part of the said stock and accumulations which might be standing in the name of the *Accountant-General* in trust for the

lunatic, without notice to the Petitioner or his solicitor.

Lord *Eldon* made an order as prayed, the Petitioner paying the committee's costs of the application.

[Secretary of Lunatics Office, Minute Book for 1825, No. 13.]

1849.

Ex parte
KENT,
In re

PETER MOORE.

In re CHARLES LUDER AUBEREY.

1836.

Dec. 14th.

BERNHARD KRUGER and *Henry Brunier* presented a petition, stating, amongst other things, that the Master, by his report in 1822, certified that *Sophia Hoffham* and *Anna Charlotte Pedder* were the only next of kin of the lunatic in *England*, and that he had been unable to ascertain who were the other next of kin. That the lunatic died in October, 1836; that, under an order made by the *Lord Chancellor*, in November, 1836, the Petitioner *Brunier* was preparing to establish his claim as next of kin; that various sums of

stock stood in the name of the *Accountant-General*, to the credit of the lunacy; that, by virtue of certain instruments, the Petitioner *Kruger* had divers claims on the share of *Brunier*, and the Petitioners prayed that no portion of the funds in court might be paid to *Brunier*, in respect of his share, or to any person or persons in his right, without notice to *Kruger* or his solicitor.

Ordered in the terms of the prayer.

[Secretary of Lunatics Office, Minute Book for 1836, No. 77.]

In re WALTER WELSH, Deceased.

1847.

August 1st.

THIS was an application that certain funds in court, to which Mr. *Glennie* claimed to be, as the next of kin of the deceased lunatic, entitled, might not be transferred without notice to the Petitioners, to whom he had assigned the same by way of mortgage. There was a contest in the Ecclesiastical Court, and a will was set up in opposition to the claim of *Glennie*, as next of kin. *Cottenham*, L. C., said, "If the

will is proved, the funds must be transferred to the personal representative. If the executor comes here I must part with the fund to him; I cannot sit here to review the proceedings of the Ecclesiastical Court, and decide whether he has a good claim or not; I cannot call other parties before me. The representative is entitled to the fund when he asks for it."

Order refused.

[Secretary of Lunatics Office, Minute Book, No. 29.]

1849.

Jan. 31st.

THE ATTORNEY-GENERAL v. THE CORPORATION OF LUDLOW.

After some disputes between a corporation and trustees of charity estates, a compromise was agreed on and confirmed by Act of Parliament, under which the corporation were to sell certain estates, and out of the proceeds pay to the trustees a gross sum of money by a fixed day. The money was not paid by the time appointed; but there being no case of wilful default made against the corporation, it was held, that they were not liable to pay interest on the gross sum.

—
Statement.

BY a charter of King Edward VI, certain hereditaments were granted to the Corporation of Ludlow; and out of the rents and profits thereof, the corporation were to continue the Grammar School at Ludlow, and maintain certain other charities therein mentioned.

In accordance with the provisions of the Municipal Corporations Act, 5 & 6 Will. IV, c. 76, an order had been made by the *Lord Chancellor*, in December, 1837, under which the Petitioners were the trustees of the charity estates which had been vested in the corporation at the time of the passing of the Act.

In November, 1837, an information was filed for ascertaining the rights and property of the charities comprised in the charter of Edward VI, and for the regulation thereof. This information was compromised, and the compromise was affirmed by a private Act of Parliament, 9 & 10 Vict. c. 18. The petition set forth the 1st, 5th, 6th, 9th, 19th, and 22nd sects. of the Act. By these sections, full powers were given to the corporation to raise money by sale or mortgage of the estates which were specified for that purpose in the Act, and to pay certain sums for costs and other matters; and by the 7th sect. it was enacted, "that the said mayor, aldermen, and burgesses should, and they were thereby authorised and required, by and out of the monies to be raised under the authority of that Act, to pay and discharge the several sums and monies following (that is to say), the said sum of 4305*l.*, and the said sum of 1500*l.*, (or so much thereof as, after deducting such sums as thereinbefore in that behalf mentioned might be

payable,) to the said trustees;" and also, "that the said mayor, aldermen, and burgesses should, with all convenient speed after the passing of that Act, and as to the said sum of 4305*l.*, and the said sum of 1500*l.* (or so much thereof as might be payable), before the 25th day of March, 1847, and as to the said costs, charges, and expenses, or such of them as should then have been incurred, before the said 24th day of June, 1847, proceed to raise the necessary fund for the payment and discharge of the said several sums, debts, liabilities, costs, charges, and expenses, and for the several purposes of that Act, by the ways and means thereafter provided, or any of them."

1849.
 ATT.-GEN.
 v.
 THE CORPORATION OF LUDLOW.
 ———
Statement.

These sums not having been paid by the day appointed for the payment thereof, in consequence, as was alleged by the corporation, of unforeseen and inevitable delays, the Petitioners, on the 5th of July, 1847, served a notice on the corporation, that the money must be paid to the Petitioners, with interest at 5 per cent.; and in December following they presented this petition.

The petition prayed, that if the Court thought the Petitioners were not entitled to interest, they might be at liberty to receive the principal sums of 4305*l.* and 1500*l.* without interest; but if the Court thought that the sums carried interest, then that the corporation might be directed to pay the principal sums with interest, and for the investment of the money.

The petition was mentioned on several days in the month of May, 1848, and ultimately stood over for judgment.

—————
 The *Solicitor-General*, Mr. *Blunt*, Mr. *James Parker*, Mr. *Rolt*, and Mr. *Lewin*, appeared for different parties.

Argument.

1849.
 ATT.-GEN.
 v.
 THE CORPORATION OF LUD-
 LOW.
 ———
Judgment.
 ———
 Jan. 31st.

THE LORD CHANCELLOR, after stating the facts of the case, said that there was nothing in this case, except the fact that when the time arrived which was specified by the Act, the money was not paid, and it was not paid when the petition was presented; and the question was, whether the corporation were liable to pay interest. There was nothing in the nature of the transaction to influence the Court's decision; there was an agreement, confirmed by an Act of Parliament, for payment by a certain day; and the petition did not state any special case beyond the mere fact of the liability of the corporation, and the non-payment of the money. The allegation was, that the property was not sold, and the money therefore was not realised under the Act at the time when by the Act it ought to be paid. It was not suggested that there was improper delay which ought to subject the corporation to more liabilities than the Act imposed on them; and it was quite clear that the case was divested of any circumstances of misapplication. The question, therefore, was, whether, according to the ordinary practice of the Court, it would require the corporation to pay this gross sum of money, with interest. Much stronger cases had occurred, in which the parties had not been required to pay interest. As to the Act 3 & 4 Will. IV, c. 42, which gave parties a claim to interest which they had not previously possessed, the 28th sect. enacted, that "upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquiry of damages, might, if they should think fit, allow interest."

If a fixed rule had been established by Parliament as to debts due at law, this Court would be very much inclined to adopt a similar rule with regard to debts which were enforced in equity. This principle was laid down in *Hyde v. Price* (a). But the Act merely gave a power—a

(a) 8 Sim. 578.

jury "might, if they should think fit." It did not give the creditor a right to interest, but only enacted, that, if the circumstances appeared such as made a jury think it right, interest might then be given. If, therefore, a similar rule were applied to cases in equity, the Act would only authorise the Court to give interest, if it should think fit. In considering cases of such a nature, the Court must look to the facts which were established. It was not more than justice, in many cases, that when the money was not paid, the defaulter should give some compensation. But if this were done in the present case, without any special circumstances, the Court must give interest in all cases. There was merely lapse of time, and no fault suggested, and the Court certainly could not refuse interest in any other case, if it allowed it here; and it would be establishing, that a sum of money payable at a certain time, and not paid by that time, would in all cases carry interest. If the Act required this, it must of course be done; but as it merely authorised the Court to allow interest, this did not seem a proper occasion to make such an order. The prayer of the petition must be granted, so far as it asked for leave to accept the principal sums without interest.

1849.
 ATT.-GEN.
 v.
 THE CORPORATION OF LUD-
 LOW.
 Judgment.

1849.

Feb. 5th.

PIDDING v. FRANKS.

A bill was filed by a patentee, against parties who had agreed to purchase from the sole licensee all his interest in the patent, and who were then carrying it on; and an injunction was moved for to prevent them from violating the covenants of the deed of license. They denied the utility of the patent, and stated that they did not intend to use it. The motion stood over, with liberty for the Plaintiff to bring an action at law:—*Held*, that he was not entitled to any admissions from the Defendants as to the validity of the patent, or as to their being licensees.

Statement.

THE original bill was filed on the 1st of March, 1848, against five Defendants, *Franks, Millard, Baker, Lawrance, and Swinborne*.

The bill stated, that in May, 1846, the Plaintiff obtained a patent for “an improved process for preserving the flavour of coffee and cocoa, or of any preparations thereof, from the effects of the atmosphere;” that this object was to be attained by the use of cases of a particular description; that, in November, 1846, he granted to *Swinborne* an exclusive license to use the patent, with power for *Swinborne* to grant any sub-licenses, the Plaintiff receiving half the premiums; and *Swinborne* covenanted to use his utmost efforts to make the said invention profitable, and to pay a per centage to the Plaintiff on the gross amount of sales of coffee packed in pursuance of the invention, and to affix a particular label on each packet, to denote that it was made up according to his invention; that *Swinborne* carried on some extensive works for the manufacture of coffee packed according to the Plaintiff’s invention, and granted several sub-licenses, for which a sum of about 5500*l.* was paid, and used labels according to the form agreed upon; that, in September, 1847, *Swinborne* agreed to assign to *Franks* and *Millard*, and they agreed to purchase, his interest in the patent process under the deed of license, and also his stock, upon the terms and stipulations, and subject to the covenants and agreements contained in the deed of license; that, by virtue of that agreement, *Franks, Millard, Baker, and Lawrance*, had made arrangements to carry on the business, and had carried it on accordingly, and that they continued to sell coffee in packets, with labels similar to the former labels, with the exception that the firm of “*Baker & Co.*” was upon it;

but that, instead of selling only pure and unadulterated coffee, as they were bound to do, they were adulterating it, and the value of the patent was thereby much depreciated; and that, in other particulars, they were acting in violation of the covenants contained in the deed of license, and to the prejudice of the Plaintiff.

1849.
 PIDDING
 v.
 FRANKS.
 ———
Statement.

The bill prayed for an account of the quantity of coffee manufactured and sold by the first four Defendants under the agreement with *Swinborne*, and under the deed of license, and for an injunction to restrain them from manufacturing or selling any article under any title purporting to denote coffee packed according to the Plaintiff's invention, otherwise than in conformity with the covenants in the deed of license, and from manufacturing or selling under that deed any adulterated article, under any title purporting to denote coffee manufactured and packed according to the Plaintiff's invention.

On the 6th of March, 1848, the Plaintiff moved for an injunction, according to the prayer of the bill, and, at the Defendants' request, the motion stood over, upon their undertaking not to do any of the acts sought to be restrained.

On the 13th of March, the Plaintiff filed a supplemental bill, alleging, that since the original bill was filed the Defendants insisted that the article sold by them was manufactured and packed without regard to the letter of license, and they had left out the names of the Plaintiff and *Swinborne* from the labels, and substituted a label which was, nevertheless, a colourable imitation of the former one, but entirely omitting all reference to the Plaintiff's patent; and that they intended to continue to manufacture and to sell this article without reference to the license, or to any of the Plaintiff's rights; and that the coffee so sold was

1849.
 PIDDING
 v.
 FRANKS.
 —
Statement.

composed of the same ingredients as the coffee formerly sold with the old labels.

The bill prayed for an injunction to restrain the Defendants from manufacturing or selling, except under the letter of license, any coffee by the name formerly used, or any similar name; and also, from manufacturing or selling, under any name, any article manufactured in the same manner as the article sold by them at the time of the filing of the bill, under the name formerly used; and also, from manufacturing or selling any article in imitation or infringement of the Plaintiff's invention.

The Defendants, by their answer and by affidavits, denied the value of the Plaintiff's patent, and alleged that his invention was altogether an impracticable project, and that they had for sometime used it only when required to do so by any of the sub-licensees; that most of their coffee was packed in the mode which was generally adopted before the patent; and that they had never used labels without the Plaintiff's name upon them for any packets which were made up according to his invention; but that the invention could not be carried on to any advantage, and that they manufactured and packed coffee in the ordinary manner, without using the Plaintiff's invention, which they contended they were entitled to do, and that they had made no alteration in their labels since the filing of the supplemental bill.

The motion in the original suit, and also a motion to commit the Defendants for a violation of their undertaking, and a third motion for an injunction, according to the terms of the prayer of the supplemental bill, came on to be heard before the Vice-Chancellor *Knight Bruce*, on the 27th of April, 1848, when his Honor ordered that they should stand over, without prejudice, with liberty to the

Plaintiff to bring such action at law as he might be advised against the Defendants, or any one or more of them.

1849.
 PIDDING
 v.
 FRANKS.

The Plaintiff now moved, before the *Lord Chancellor*, that that order might be discharged as to the two motions for injunctions, and for an injunction as before.

Mr. *Cooper* and Mr. *Daniel* for the Plaintiff:—

Argument.

An action at law would be a satisfactory mode of trying the rights of the Plaintiff, as between himself and a stranger. He would be obliged to support his patent in the usual manner. But the Defendants in this case are equitable licensees of the patent; they are entitled to, and they have availed themselves of, the benefit of the patent, and they were doing so when this bill was filed. The rights, therefore, of the Plaintiff, as against the Defendants, depend on their relative position at that time. As equitable licensees, they have admitted the validity of the patent, and they are precluded from calling it in question: *Baird v. Neilson*(a), *Bowman v. Taylor*(b). They are carrying on their business in violation of the covenant in the deed of license. Now, no form of action will enable the Plaintiff to raise the question, whether the Defendants, as equitable licensees, are liable for that violation. It is, consequently, essential to justice that some admission should be made by the Defendants, to enable the real question between the parties to be tried in a court of law.

[The LORD CHANCELLOR.—If they are violating a patent right, no admissions are necessary to assist an action. But

(a) 8 Cl. & Fin. 726; and see Hindmarch on Patents, p. 278.

(b) 2 Ad. & E. 278.

1849.
 PIDDING
 v.
 FRANKS.
 ———
Argument.

they are not precluded as equitable assignees from raising any question as to the validity of the patent. Are they not at liberty to say, "We have bought the right, but we do not use it, and do not intend to use it?"]

It would be like a party who has committed waste, coming into court and saying, "I do not intend to commit any more waste." The right to an injunction must depend, not on what the Defendants say now, but on the rights and relative position of the parties when the bill was filed, and the Defendants then claimed under the license.

Judgment. The LORD CHANCELLOR:—

That is one point in the case. They say they are not bound by anything they have done. If I call on them to admit that they have a legal assignment, that would preclude them from raising one point on which they ground their defence. If you have any such question, the hearing is the time to try it. I cannot make a party give up his equity, to enable you to try the case at law. The Court must first decide that the Defendants have put themselves in such a position as to deprive themselves of the right of disputing the legal question. The motion must be refused, with costs.

Mr. *Russell* and Mr. *Prior* appeared for the Defendants.

1849.

Ex parte HAWTHORN, *In re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.

Jan. 30th.

THIS was an application on behalf of *Robert Hawthorn*, that his name might be struck out of the list of contributories of the North of England Joint-stock Banking Company.

A party who has transferred his shares in a joint-stock company within three years, may be included in the list of contributories prepared in pursuance of the Joint-stock Companies Winding-up Act, 1848; the order in which his liability attaches being a subject for future arrangement.

Statement.

An order had been made, under the Joint-stock Companies Winding-up Act, 1848, for dissolving and winding up the affairs of that Company; and the Master to whom the cause was referred had inserted the name of *Hawthorn* in the list of contributories, in respect of eighteen shares. *Hawthorn* had transferred those shares in January, 1847, the transfer being completed on the 2nd of that month. By the deed of settlement of the Company it was provided, that, upon the transfer of any shares, the rights and liabilities of the transferror, in respect of those shares, should cease; but he was not to be thereby released from his proportion of the losses (if any) sustained by the Company up to that time.

When the official manager proceeded to make out the list of contributories, the name of the party to whom *Hawthorn* had transferred his eighteen shares was inserted as a contributory in respect of them. But one of the other shareholders insisted that the name of *Hawthorn* also ought to be inserted; and the Master thereupon included him as a contributory, liable to the debts, liabilities, and losses (if any) of the Company, up to and including the 1st of January, 1847.

Hawthorn had thereupon moved, before the Vice-Chan-

VOL. I.

Q

L. C.

1849.

Ex parte
HAWTHORN,
In re
THE NORTH OF
ENGLAND
JOINT-STOCK
BANKING Co.

—
Argument.

cellor *Knight Bruce*, that his name might be struck out; but his Honor refused to make any order (a), and the case now came before the *Lord Chancellor* by way of appeal.

—
 Mr. *James Russell* and Mr. *Bates* in support of the application:—

It is admitted that *Hawthorn* ceased to be a shareholder in January, 1847; and the ordinary effect of a transfer would be, that the transferee would assume all the rights and liabilities of the transferror, in respect of the shares transferred. But this was an attempt to make a former shareholder contribute for the benefit of the present shareholders.

The 76th section of the Joint-stock Companies Winding up Act provides for different classes of contributories.

[The LORD CHANCELLOR.—The Master has decided that *Hawthorn* is liable as a contributory; but he has not decided whether that liability attached in the first, second, or twentieth degree.]

It ought to have been shewn that all the assets of the Company were exhausted, and that all the present shareholders had been required to contribute their proper proportion, before any of the former shareholders were held to be responsible in any degree: *Barker v. Buttress* (b); *Eardley v. Law* (c); *Field v. Mackenzie* (d).

(a) 1 De G. & S. 571.

(b) 7 Beav. 134.

(c) 12 Ad. & E. 802.

(d) 4 C. B. Rep. 705.

Mr. *Bacon*, Mr. *Lloyd*, and Mr. *Headlam*, on the other side, were not called on.

1849.
Ex parte
HAWTHORN,
In re
THE NORTH
OF ENGLAND
JOINT-STOCK
BANKING Co.

Judgment.

The LORD CHANCELLOR:—

Under the provisions of the Act, the Master has, at some time, to decide the order in which the parties are liable, and then you have the benefit of any rule of law. Unless there is something more in this case, I think there is no difficulty at all in it. The Winding-up Act defines who are contributories. It says, "The word 'contributory' shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, *or as a former member of the same*, or as heir, devisee, executor, or administrator of a former member of the same, deceased, or otherwise howsoever." The official manager is bound to make out a list of the members and other contributories of such company, which the Master is to settle. Then the Master, having ascertained the contributories and the debts, and the amount being arranged which has to be raised by means of calls, the Master, under the 84th section, is to "apportion the same among the several contributories of the company appearing from time to time upon the list, so far as then settled by the Master, or such of them as ought to contribute thereto, according to their respective liabilities, and that such apportionment may be made against such parties as he has already determined to be contributories, although it may then be under consideration, or uncertain whether other parties ought or ought not to be included in the list of contributories." Every person who, in any event, may become liable, is to be included in the

1849.

Ex parte
 HAWTHORN,
In re
 THE NORTH
 OF ENGLAND
 JOINT-STOCK
 BANKING CO.

—
Judgment.

list. Nothing is said as to the order of their liability, but as to the persons against whom a right of claim exists.

Here is a party who was a shareholder, and therefore liable to all losses up to January, 1847—a fact as to which there is no dispute. As to his being liable in equal degree with the other contributories, or liable in any other degree, the list does not determine; but when the Master has got before him all those who are liable to contribute in any degree, then he must decide in what order they are liable. When he finds persons who may be liable, he is to include them all; for the 84th section says, that the list is to consist, not only of those who are primarily liable, but of those also who are liable in the second, third or fourth degree. This gentleman stands in the list, and, whether he is put there by a shareholder or by the official manager, is immaterial. All I decide is, that the Master is correct in deciding that *Hawthorn* is a party who may be liable to the debts of the Company anterior to January, 1847.

The application must be refused, with costs.

1849.

Ex parte SPACKMAN, *In re* The AGRICULTURIST
CATTLE INSURANCE COMPANY.

April 4th,
16th, & 19th.

THIS was a petition presented by *George Spackman*, farmer, and *Joseph Spackman*, farmer, two of the shareholders of the *Agriculturist Cattle Insurance Company*, praying for an order, under the *Joint-stock Companies Winding-up Act, 1848*, for dissolving and winding up the affairs of the Company. It had been heard, in the first instance, by Vice-Chancellor *Knight Bruce*, who dismissed it with costs^(a); deciding that the objects of the Company did not bring it within the scope of the Act, and also intimating an opinion that the facts of the case would not otherwise have induced the Court to interfere.

The petition stated, that in 1845 a joint-stock insurance company was formed, under the name of "*The Agriculturist Cattle Insurance Company*;" that the capital was divided into shares, which were transferable without the express consent of all the copartners; that the Company consisted of more than twenty-five members, and that it was within the provisions of the *Joint-stock Companies Winding-up Act, 1848*; that, by the deed of settlement, the capital of the Company was to consist of 500,000*l.*, divided into 25,000 shares of 20*l.* each; that the objects of the Company were thereby stated to be, "to make and effect insurances against loss by mortality in all kinds and descriptions of animals, whether biped or quadruped, being property or livestock belonging to farmers, keepers of exhibitions of animals, and others, which might then, or at any time thereafter, be kept by any person or persons for the purpose of pleasure or profit, whether such mortality should be occasioned by death without apparent cause, during the

A joint-stock company, formed for the insurance of cattle, had sustained heavy losses, and was under liabilities to their insurers to a great amount. Many of the shareholders had been allowed to retire from the company, so as to avoid any future liabilities:—*Held*, that the Court is not entitled, under the *Winding-up Act*, to look into the accounts of the company; and, there being none of the tests of insolvency provided by the Act, nor any act done which amounted to a dissolution of the company, the Court refused to make any order for winding up the affairs of the company.

Whether a company formed for such purposes is within the scope of the *Winding-up Act*—*Quære*.

(a) 1 De G. & S. 599.

1849.

Ex parte
SPACKMAN,
In re
THE AGRICUL-
TURIST CATTLE
INSURANCE CO.

Statement.

period of insurance, or by the slaughter of any animal or animals in consequence of taint or infection, or suspected taint or infection, by or from any disease which should be or be considered to be contagious or epidemic, or endemic, or the animal or animals insured should die, or, with the consent of the Company, or its officers or servants duly authorised in that behalf, be slaughtered in consequence of illness, disease, or accident, or other just means or cause;" that, by other clauses, the Company was empowered to lend money on mortgage for the improvement of land, and other agricultural purposes; and that, with the consent of a certain majority of the shareholders, the Company might effect insurances on human life, and also on ships, and might engage in the purchase and sale of annuities; and that power was reserved by the deed to dissolve the Company by the resolution of a general meeting confirmed by subsequent meetings.

The deed was completely registered on the 1st of September, 1845.

The Company had carried on business to a considerable extent, and had thereby sustained great loss; but they had declared a dividend, which had been paid out of the capital of the Company, although such a proceeding was directly in violation of one provision of the deed of settlement. Up to June, 1848, the receipts of the Company for premiums amounted to 132,712*l.* 5*s.* 1*d.*, and they had paid 139,944*l.* 0*s.* 6*d.*, and had since paid a further sum, making the whole amount of loss 26,115*l.* 7*s.* 4*d.* during three years. Three calls had been made, but the second and third calls had been paid on part only of the shares. The holders of 4262 shares had made an arrangement with the Company, in November, 1848, by which they consented to subscribe a certain sum to the Company, and were thereupon allowed to retire from it, and not incur any further

liabilities. The extent to which insurances had been effected with the Company, and for which it was of course liable, amounted to nearly 1,200,000*l*.

In opposition to the petition, it was stated by affidavit, that the losses which the Company had sustained had arisen in a great degree from the low rate at which the premiums had been calculated, (but they had since been raised,) and partly from a disease among cattle, which had increased the number of deaths beyond the average.

1849.
Ex parte
 SPACKMAN,
In re
 THE AGRICUL-
 TURIST CATTLE
 INSURANCE CO.
 ———
Statement.

The *Solicitor-General*, Mr. *Swanston*, Mr. *Collins*, and Mr. *Fitzherbert*, appeared in support of the petition ; and

Argument.

Mr. *James Russell* and Mr. *Prior* opposed it.

The first question raised was, whether a Company of this description fell within the scope of the Winding-up Act, as being a trading or commercial Company ; and, in support of that point, the definition of “commerce” in *Richardson’s* and *Johnson’s* Dictionaries, and also *Hume’s* Essay on Commerce, were referred to ; and also an observation of Lord *Campbell*, in *M’Kay v. Rutherford* (a) : “Wherever capital is to be laid out on any work, and a risk run of profit or loss, it is a commercial venture ;” *Smith’s* Wealth of Nations, b. 1, c. 4 ; *Anderson’s* History of Commerce, vol. 2, p. 293, mentioning a company for the insurance of horses and other cattle among the commercial speculations of 1720 ; *In re The Wheal Lovell Mining Company, Ex parte Wyld* (b) ; *Const v. Harris* (c) ; *Pearce v. Piper* (d) ; *Reeve v. Parkins* (e) ; and *Hankey v. Jones* (f).

On the other hand, it was contended that an insurance

(a) 13 Jur. 23.

(b) Ante, p. 125.

(c) T. & R. 496.

(d) 17 Ves. 1.

(e) 2 J. & W. 390.

(f) Cowp. 747.

1849.

Ex parte
SPACKMAN,
In re
THE AGRICUL-
TURIST CATTLE
INSURANCE Co.

—
Argument.

was merely a covenant of indemnity, and that an underwriter had been held not to be within the meaning of the bankrupt laws, until he had been brought within their operation by express enactment(a).

The second point was, whether the situation of the Company would, in any case, entitle the Petitioners to such an order. It was contended, on the one hand, that, from the amount of losses of the Company, the extent of its liabilities, and the difficulty in obtaining payment of the calls, the Company was, in fact, insolvent; that, from the secession of so large a proportion of the shareholders, it was virtually dissolved, and was merely being carried on for the purpose of being wound up.

On the other side, it was insisted that the business was now being carried on upon an improved system, and with reasonable hopes of future profit; that the supposed difficulty of getting payment of the calls could not be taken into account, and that the state of the Company did not furnish any of the tests of insolvency which the Act required

April 19th. The LORD CHANCELLOR:—

Judgment.

This is an application made under the Joint-stock Companies Winding-up Act, to dissolve the Company and to wind it up. Two questions have arisen in the case: the first, whether the Company is of a description which subjects it to the operation of the Winding-up Act; and, secondly, whether the facts stated shew a case which makes it proper for the Court, or incumbent upon it, to exercise the jurisdiction given it by the Act.

The Company was established for a singular purpose,

(a) 6 Geo. 4, c. 16, s. 2; *Ex parte Bell*, 15 Ves. 355.

but one which, very possibly, may be of the highest utility, although it is obviously of a nature which must have rendered it very difficult to bring it into a proper form. This object was the insurance of cattle.

The principles which regulate the insurance of human lives are subject to considerable difficulty. At first there were great difficulties in estimating the value of lives, and great errors and very erroneous calculations were made as to the effect which the various habits, employments, situations, and casualties had upon the average duration of human life. Such calculations, with regard to cattle, are obviously more difficult. The usual casualty which awaits cattle is, I understand, excluded from the operations of this Company, but to all other casualties it remains open. With regard to these, it was found a very difficult matter for the Company to be informed at once, so as to bring their rates within that degree of certainty which was necessary to enable them to carry on business with success, and to realise the objects of its establishment.

Thus, it appears that at first the calculations were erroneous as to the chances of mortality, and the premiums far too low. It appears, besides, from the affidavits, that a disease of an epidemic character broke out shortly after the establishment of the Company, amongst cattle, by which considerable loss arose, and which involved the Company in difficulties at its first starting.

The capital of the Company was not all realised by calls, but remained on the liability of the parties who had engaged to furnish the capital as it was required. In fact, they were the holders of the capital to the extent of the shares they had taken, until it was required by the Company. The petition states all this, and then it states the difficulties the Company got into, and the losses it had

1849.

Ex parte
SPACKMAN,
In re
THE AGRICULTURIST CATTLE
INSURANCE CO.

Judgment.

1849.

Ex parte
SPACKMAN,
In re
THE AGRICUL-
TURIST CATTLE
INSURANCE Co.

Judgment.

sustained, and compares the liabilities with the capital existing. But it also includes the liabilities to which the Company may become subject. It is quite obvious that they ought not to have taken that into their calculation, because the premiums hereafter to be paid will more than meet such contingent liabilities. The greater the amount of business done by the Company the greater would the amount of their liabilities appear. But then, in all probability, the profits would be increased in the same ratio. In respect of insurances against fire, if all the property were burnt, the companies would be placed in great difficulties; but that is not likely to be the case; and the losses sustained by the destruction of property which is burned are more than covered by the premiums upon property uninjured. I cannot, therefore, consider the liability which the Company is under by its contracts of insurance at all proper to be taken into account. But have I any right to look into the state of their accounts at all? The Act gives no such power. I cannot go into their mode of carrying on their business. There are certain tests provided by the Act, arising out of other acts, and which are to be taken as evidences of insolvency, which, if coupled with other conditions, would prevent the Company from going on. But the Court cannot look into the Company's affairs in the manner proposed. If that were the law, parties might come here and say, any Company, in their opinion, had not money sufficient to carry on its business, and that its affairs ought to be wound up. If that had been all, a very short Act would have been requisite, and a very difficult jurisdiction would have been thrown upon the Court. The Legislature, however, has made certain definite acts the tests of insolvency,—such as any individual shareholder being sued for the Company's debts. In this case insolvency has not been proved to exist at all. It has been alleged that the Company is subject to certain liabilities, but not beyond what might reasonably be met

by the whole capital of the Company. The shareholders might or might not be able to pay their calls; but the capital of the Company was the sum which they were liable to pay, and that, no doubt, was sufficient for liabilities which might press hard upon the existing Company.

1849.
Ex parte
 SPACKMAN,
In re
 THE AGRICULTURIST CATTLE
 INSURANCE CO.

Judgment.

I am assuming in these remarks, that this Company comes within the provisions of the Winding-up Act, and considering whether a proper case has been shewn for the interference of the Court.

Assuming, then, that the Company is within the jurisdiction of the Court, let us see if we have a proper case by which I can direct the winding up of the concern. First, with regard to insolvency. That has not been proved: not one of the tests has been shewn to apply in that respect. Then it is said that a transaction took place between the shareholders, which amounted to a dissolution, and that the directors were now, in fact, carrying on the business for the purpose of winding up the affairs of the Company. If that be so, it no doubt comes within the jurisdiction of the Court. There is also another clause, the meaning of which is very difficult, the words are left so large and indefinite. The Act gives the Court a discretionary power to wind up a company, if it should see any good reason for so doing^(a). That clause was, no doubt, so worded, in order to include all cases not before mentioned; but, of course, it cannot mean that it should be interpreted otherwise than, *ejusdem generis*, that there must be something in the management and conduct of the company, which shews the Court that it should be no longer allowed to continue, and that the concern ought to be wound up. Nothing of this kind, however, appears to me to

(a) 11 & 12 Vict. c. 45, s. 5, cl. 8.

1849.

Ex parte
SPACKMAN,
In re
THE AGRICUL-
TURIST CATTLE
INSURANCE CO.

Judgment.

have taken place with respect to the transaction so much relied on, when a certain number of shareholders retired.

It was said that was virtually a dissolution, and that, whatever had taken place since, was for the purpose of winding up. I have looked at the affidavits, and I cannot understand what has taken place in that light. The difficulties the Company had got into, naturally enough created dissatisfaction amongst the shareholders, who were required to pay calls they did not expect. They took alarm at the great responsibilities which they feared would be cast upon them. In order to meet this, a meeting was called, at which a proposition was made, that those who did not wish to continue members of the Company might retire. The way of doing this was obvious. If a shareholder did not pay his calls, his shares, according to the ordinary course, were forfeited; that, however, was a harsh measure, which it was not wished to adopt, because they lost all they had before subscribed, while they did not release themselves from the engagements of the Company then existing. It was thought more just and fair to all parties, and those who wished to go on were willing to let the dissatisfied parties withdraw on certain terms; viz., they were to pay a certain proportion of the call, but instead of being liable to further calls, their shares were to be forfeited. These terms were accepted, and a certain number retired. The other shareholders who remained were quite willing to go on with the concern, and they state in their affidavits, that they have reason to believe that the future prospects of the Company are favourable, and that there is a probability of its working its way, if not of producing a considerable profit. Of course, looking to profit, I see nothing in that to bring the Company within the jurisdiction of the Court. It cannot be said, that, because certain members have left, that dissolves the Company.

That is the only mode by which the object sought by the retiring members could be obtained. Certain proprietors are admitted to retire on terms beneficial to them, and beneficial also, I must presume, to those who offer the terms. These parties retire, but that does not dissolve the Company. The concern goes on—the premiums, which had been discovered to be too low, have been raised—certain alterations have been made in the management of the business—and the Company is not only in a position to go on with advantage, but is carrying on a business, somewhat reduced, no doubt, in its extent, but of a profitable character. Now, what is there in such a state of things to authorise the Court to wind up this Company? There is no insolvency—I have disposed of that. There is the retirement of some of the members, but a dissolution there certainly is not.

1849.

Ex parte
SPACKMAN,
In re
THE AGRICULTURIST CATTLE
INSURANCE CO.

—
Judgment.

It is said that the Company is only continued for the purpose of winding up its affairs; but that certainly is not the case. It is quite clear that the object is to continue the business—not to get in its resources for the purpose of dissolving, but to make it available for the purposes for which it was formed.

On the ground, then, that these parties make out no case which brings the Company under the operations of this Act, and to avoid the necessity of discussing the other point, as to whether the Company comes within the meaning of the Act, I shall give judgment on the facts alone.

The application must be dismissed, with costs.

1849.

April 16th,
17th, & 18th.

Ex parte BARBER, *In re* THE LONDON AND MANCHESTER DIRECT INDEPENDENT RAILWAY COMPANY (REMINGTON'S LINE).

An association formed for the purpose of obtaining an Act of Parliament to make a railway for the carrying of passengers and goods is a commercial speculation, whether they propose to run their own engines and carriages, or to let the railway to other parties; and such an association being provisionally registered, but the project being afterward abandoned, is within the scope of the Joint-stock Companies Winding-up Act.

Statement.

THIS was a petition presented under the Joint-stock Companies Winding-up Act, 1848, and it prayed for the dissolution and winding up, under the order and direction of the Court, of the London and Manchester Direct Independent Railway Company (Remington's line.)

The Company was projected in April, 1845, for the construction of a railway between *London* and *Manchester*, for the carriage of passengers and goods; and the capital of the Company was to be 3,000,000*l.*, divided into 60,000 shares of 50*l.* each. An additional branch line was afterward projected, and the capital was increased to 5,000,000*l.* The Company was provisionally registered, according to the provisions of the Act 7 & 8 Vict. c. 110. The Petitioner was a holder of 200 shares in the Company. The subscribers' agreement was in the usual form. The parties to it were described as being subscribers to an undertaking for making and constructing a railway or railways, to be called "The London and Manchester Direct Independent Railway;" and they bound themselves to conform to the rules therein contained for the management and conduct of the said undertaking, until an Act of Parliament was obtained. It was thereby agreed that the directors should have full power for carrying all or any part of the undertaking, as described in the Parliamentary contract, into effect, and for that purpose to cause all necessary surveys, estimates, contracts, &c., to be made; and also arrangements and contracts with canal and railway proprietors, land-owners, and others; and to buy up and amalgamate with other railways; and generally to adopt

all such measures for the benefit and furtherance of the line as they might think necessary; and to apply for an Act of Parliament; and that the directors should have full powers to appoint, suspend, or remove bankers, solicitors, engineers, surveyors, secretaries, clerks, agents, servants, and workmen, for the establishment, promotion, or purposes of the undertaking; and should have power to apply any part of the monies in meeting such expenses as were necessary in applying for the Act of Parliament, and all other costs, charges, and expenses incident to the undertaking, or which had been or might be incurred in respect or on account thereof, or preparatory or relating thereto; and generally to act in such manner as the directors should think most conducive to the advancement or promoting of the undertaking. And power was given to them, with the consent of a majority of the shareholders at a meeting, wholly to put a stop to and determine the undertaking, or to abandon any part thereof.

1849.
Ex parte
BARBER,
In re
THE LONDON
AND MANCHES-
TER DIRECT
INDEPENDENT
RAILWAY Co.

Statement.

The petition stated, that, instead of complying with the standing orders of the Houses of Parliament, and applying for an Act, the directors entered into some agreement, without the consent of the shareholders, for an amalgamation of the Company with the projectors of a rival scheme; and that, in consequence thereof and of various other circumstances, and, in fact, the London and Manchester Direct Independent Railway Company (Remington's line) had become wholly abortive; that the undertaking had been abandoned as wholly useless and unprofitable; that it had become wholly impossible to carry on the same; that the Company had wholly ceased to carry on any business whatever; that considerable sums had been received by the managing committee; and that a large balance still remained to be applied in meeting the outstanding liabilities of the Company; that, if the same was insufficient for such purpose, the contributories and members of the Com-

1849.

Ex parte

BARBER,

*In re*THE LONDON
AND MANCHESTER DIRECT
INDEPENDENT
RAILWAY CO.*Statement.*

pany ought to pay and make up the same rateably, according to their respective shares; that there were outstanding liabilities of the Company to a large amount that the Petitioner and the members of the Company were liable to be called upon and sued by the creditors of the Company for and in respect of such outstanding liabilities; and that the Company had no office or place of business, nor any officer.

The petition was served on two parties, who had been members of the managing committee.

It was first heard by the Vice-Chancellor *Knight Bruce*, who held that such an association was not within the scope of the Winding-up Act, and dismissed the petition. It was now brought before the *Lord Chancellor*, by way of appeal.

Argument.

Mr. *Bacon* and Mr. *J. H. Palmer* in support of the petition :—

The Winding-up Act is to apply to all companies which are within the provisions of the 7 & 8 Vict. c. 111, and that Act is to apply to any company “then or at any time thereafter associated together for any commercial or trading purposes, and registered either provisionally or completely”(a). If, therefore, this is a company formed for trad-

(a) By the 1st sect. of the 7 & 8 Vict. c. 111, it is enacted, “that, if any commercial or trading company now or at any time hereafter incorporated by charter or Act of Parliament, or any company or body of persons now or at any time hereafter associated together for any commercial or trading purposes, and to which any privilege

or privileges, or power or powers, shall, before or after the passing of this Act, have been granted under the authority of the Statute made and passed in the first year of the reign of Her present Majesty, intituled, ‘An act for better enabling Her Majesty to confer certain powers and immunities on trading and other companies,’ or

ing or commercial purposes, within the meaning of the 7 & 8 Vict. c. 110, and is registered, it is within c. 111, and, consequently, within the scope of the Winding-up Act. Now it was formed for the purpose of making a railway; and railway companies, as a general rule, use their railways for the purpose of carrying passengers and goods. If they are carriers, they are clearly a trading company; and if they do not actually become carriers themselves, still the railway is formed for that purpose, and with a view of yielding a profit, by being devoted to that object, and is therefore a commercial company. It was said in the Court below, that this was not a company, and certainly not a trading company, but merely an association, which had come to an agreement to endeavour to form a future company; but the 7 & 8 Vict. c. 111, comprises companies as trading companies which are only provisionally registered; and, by the Registration Act, companies are precluded from actually trading till they are completely registered.

1849.
Ex parte
BARBER,
In re
THE LONDON
AND MANCHES-
TER DIRECT
INDEPENDENT
RAILWAY Co.

Argument.

by any act of Parliament; or any commercial or trading company or body which, by the said Statute made and passed in the first year of the reign of her present Majesty, is to be considered as subsisting, and to be subject to the provisions of the said Statute in manner therein mentioned; or any company or body of persons now or at any time hereafter associated together for any commercial or trading purposes, and registered, either provisionally or completely, under the provisions of any Act passed, or to be passed, in the present session of Parliament, for the registration and regulation of joint-stock companies; or any joint-stock company now existing, and comprehended within the definition therein contained

of a joint-stock company, shall commit any act which by this Act is to be deemed an act of bankruptcy on the part of any such company or body, a fiat in bankruptcy may issue against such company or body, by the name or style of the said company or body, upon the petition of any creditor or creditors of such company or body, (whether a member or members of such company or body or not,) to such amount as is now by law requisite to support a fiat in bankruptcy; and the Court authorised to act in the prosecution of such fiat, and all persons acting under such fiat, may proceed thereon in like manner as against other bankrupts, subject always to the provisions hereinafter made."

1849.

Ex parte

BARBER,

*In re*THE LONDON
AND MANCHESTER DIRECT
INDEPENDENT
RAILWAY CO.*Argument.*

A subscribers' agreement is therefore sufficient to bring a company within the Act, and the absence of actual trading will not exclude it.

It was also contended, that, as the 1st sect. of the Winding-up Act (a) expressly comprises all companies which are within Lord *Dalhousie's* Act (b), and which became bankrupt on or before the 1st of March, 1848, all railway companies which do not answer that description are not included; but reference to that Act was merely introduced to prevent any doubt whether the Winding-up Act was to comprise companies for which Lord *Dalhousie's* Act had already provided to some extent.

Mr. *James Russell*, Mr. *Rolt*, Mr. *Daniel*, and Mr. *Stevens*, contra:—

(a) By the 1st sect. of the Joint-stock Companies Winding-up Act, 1848, it is enacted, "that this Act shall apply to all companies, corporate or unincorporate, within the provisions of either of the two Acts (7 & 8 Vict. c. 111, and 8 & 9 Vict. c. 98) first hereinbefore mentioned, (including all companies existing on the 1st day of November, 1844, and which shall have obtained or shall obtain a certificate of registration under an Act passed in the 7th and 8th years of the reign of her present Majesty, intituled, 'An Act for the registration, incorporation, and regulation of joint-stock companies'); and to all companies which would have been within the provisions of either of the said two Acts, if they had not been dissolved, or had not ceased to trade at the time of the passing thereof respectively; and to all banking companies which

would have been within the provisions thereof, if they had not been specially excepted from the provisions of an Act passed in the session of Parliament held in the 7th and 8th years of the reign of her present Majesty, intituled, 'An act for the registration, incorporation, and regulation of joint-stock companies;' and to all companies which, under the provisions of the said Act to facilitate the dissolution of certain railway companies, shall, before the 1st day of March, 1848, have become bankrupt; and to all companies, associations, and partnerships to be formed after the passing of this Act, whereof the capital or the profits is or are divided or to be divided into shares, and such shares transferable without the express consent of all the co-partners."

(b) 9 & 10 Vict. c. 28.

The Winding-up Act contains an express enactment, that, under particular circumstances—namely, if they become bankrupt by the 1st of March, 1848—railway companies shall be within the scope of the Act. It is now contended, first, that *all* railway companies are within it, whether they become bankrupt or not; and, secondly, that all these particular railways are within it which become bankrupt by a fixed day—a construction which renders that express enactment altogether absurd.

1849.
Ex parte
 BARBER,
In re
 THE LONDON
 AND MANCHESTER DIRECT
 INDEPENDENT
 RAILWAY Co.
 —
Argument.

[The LORD CHANCELLOR.—Do you mean, that no railway company is within the Winding-up Act which does not become bankrupt?]

That construction makes the Act consistent with itself. Lord *Dalhousie's* Act applied the test of bankruptcy, and if that test was not intended by the Winding-up Act to be retained, all reference to the former Act was useless.

[The LORD CHANCELLOR.—It may mean, that, although companies have become bankrupt, and ought, therefore, to be no longer considered as companies, they may still be treated as companies for the purposes of this Act. Can you suggest any reason why railway companies, becoming bankrupt, should be within the Act, and no other bankrupt companies?]

By Lord *Dalhousie's* Act, sect. 23, railway companies may become bankrupt by their own vote. The 7 & 8 Vict. c. 111, is stated to be an Act for companies which are “unable to meet their pecuniary engagements.”

[The LORD CHANCELLOR.—You cannot refer to the title of an Act, upon a question as to its construction.]

Liability to bankruptcy is the test of the association

1849.

Ex parte
BARBER,
In re
 THE LONDON
 AND MANCHES-
 TER DIRECT
 INDEPENDENT
 RAILWAY CO.

—
Argument.

being within the Act. Under the 7 & 8 Vict. c. 110, an association, while it is merely provisionally registered, is expressly prohibited from trading. It may allot shares and receive an instalment of 10s., but it cannot carry on any commercial business. The subscribers' contract shews the object of this Company, which was to apply to Parliament for an Act; and even if they succeeded in obtaining one, it does not follow that the railway company would necessarily become carriers. The Railways Clauses Act would not affect them, unless it was incorporated with their special Act. The *Herne Bay Pier Company* was held not to be a trading company as wharfingers (a).

Mr. *Bacon* in reply :—

Bankruptcy cannot be necessary to bring a company within the Winding-up Act, because, by the 7th and 8th heads of the 5th sect., ceasing to trade, or any other just ground for dissolution, enables the Court to interfere.

A company which is only provisionally registered may enter into conditional contracts, and a fiat may issue against such a company. Actual trading is, therefore, unnecessary; and the only motive which can be supposed to have led these parties to form a company was the expectation of profit to be derived from forming a railway, and having it applied to the trading and commercial purposes of carrying and conveying passengers and goods: *M'Kay v. Rutherford* (b).

(a) 1 De G. & S. 588.

(b) Before the Privy Council, in December, 1848. In this case Lord *Campbell* observed, "Wherever capital is to be laid out on any work, and a risk run of profit or loss, it is a commercial venture."

And Mr. *Pemberton Leigh* (Chancellor of the Duchy of Cornwall), said, "Each act of buying and selling is an act of commerce: a number of such acts would make a trader." See 13 Jur. 23.

The LORD CHANCELLOR :—

The question, and the only question on this motion was, whether this Company was within the meaning of the Winding-up Act. It is said to be an association for the purpose of obtaining an Act to make a railway, which, however, was, in fact, abandoned. And the Company having failed, after some preliminary proceedings, without going further, it was contended that it was not within the Winding-up Act, and the ground was, that it was not a commercial company. It was said that the contract was merely to make a railway, and that the making of a railway was not a matter to which the Act was applicable, as it was not shewn from the subscribers' contract to be necessarily a commercial undertaking. The affidavit in support of the application, which is not met by any affidavit on the other side, states that the Company was projected for the construction of a railway for the carriage of passengers and goods. It was said that they might merely make the railway, and not use it as carriers, but make it for the purpose of enabling others to use their own carriages, because it was at one time supposed that that was the mode in which railways would be used. I do not think it would be material whether it were used for the one purpose or the other, because the object of the Company was to make a railway which might be used by themselves or others for their benefit. It was a joint-stock company, therefore, formed with a view to advantage and profit, either by letting the railway or by using it and acting as carriers themselves; and I think this difference is not material.

The question is, whether, under that description, and with that announcement of their objects, they are within the provisions of the Winding-up Act. [His Lordship read the preamble and the 1st sect. of the Winding-up Act.] It is clear, therefore, that the Company in question would

1849.

Ex parte
BARBER,
In re
THE LONDON
AND MANCHESTER DIRECT
INDEPENDENT
RAILWAY Co.

Judgment.

1849.

Ex parte
BARBER,
In re
 THE LONDON
 AND MANCHESTER DIRECT
 INDEPENDENT
 RAILWAY CO.

—
Judgment.

have been within the provisions of this Act, if the Act had existed in 1845, before the Company was formed. But as the Company was formed before the Act was passed, it is not included in this latter part of the sect.: and if it is within the Act at all, it must be by means of its being incorporated with the 7 & 8 Vict. c. 111. It is quite clear that it is within the Registration Act. [His Lordship referred to the description of companies in the 1st sect. of the 7 & 8 Vict. c. 111.] Now, the words there used are, "commercial or trading purposes." In the Registration Act the words are, "for any commercial purpose, or for any purpose of profit." Why these expressions are departed from in c. 111, which are found in c. 110, I am not able to discover, but c. 111 seems to have intended the same purpose and object as c. 110. I do not think that variation makes any difference, because, whether you take the expression "commercial or trading purposes," or "purpose of profit," every commercial adventure is an adventure for profit, and therefore there is no material difference between the two modes of expression. The question, consequently, is, whether this association clearly comes within the Registration Act, and whether an association provisionally registered for the purpose of making a railway for carrying passengers and goods, is or not within c. 111, as a "company or body of persons associated together for commercial or trading purposes." Trading, under the bankrupt laws, has obtained a judicial meaning. Whether I adopt the definition which seems to have been given by the members of the Judicial Committee, in the case of *M'Kay v. Rutherford* (a), is not necessary for me to decide; because it appears to me that nothing is more a commercial speculation than a manufacture of goods. It is a speculation, as this is, by which profit is to be obtained, whether in the character of carrying, or selling, or letting. If the makers of the railway sell it to others, or let it out to others, it is

(a) 13 Jur. 23.

still an undertaking for the purpose of traffic. If you build steam-vessels for the purpose of traffic, or for the purpose of establishing certain steam communication, they are to be used for the purpose of carrying goods and passengers. That would be a commercial speculation; that would be the machinery out of which the profit was to be obtained. The case of *M'Kay v. Rutherford* no doubt goes a great way, if we adopt the observation of Lord *Campbell*, as connected with the establishment of railways, or whether we take the definition which Mr. *Pemberton Leigh* gives. But, without the aid of that case, I have no doubt or question that the manufacture of a railway for the purpose of deriving profit by carrying passengers and goods, is a commercial speculation; and, though the object of this speculation is abandoned, the parties are within the Act; and, therefore, it is a proper case in which an order should be made for winding up the affairs of the Company.

1849.
Ex parte
 BARBER,
In re
 THE LONDON
 AND MANCHESTER DIRECT
 INDEPENDENT
 RAILWAY CO.
 —
Judgment.

GRAHAM v. MAXWELL.

Feb. 9th.

THIS was a creditors' suit to administer the estate of a Mr. *Maxwell*. The Defendant was his widow and personal representative, and the usual decree had been obtained for taking the accounts of the testator's estate, debts, &c. Shortly afterward, and before he was aware either of the decree or the institution of the suit, Dr. *Moffatt*, one of *Maxwell's* creditors, had commenced an action in *Scotland* against Mrs. *Maxwell*, in respect of a sum of money due to him from the testator, which he alleged that he could recover by the laws of *Scotland*,

Although a cause of action arises entirely in *Scotland*, and all the witnesses reside there, the creditor will not be allowed to proceed with an action there, after a decree has been obtained in *England* for the administration of the deceased debtor's estate,

and the Scotch creditor has come in before the Master to prove his debt; and he will be liable to pay the costs of an application to restrain him from prosecuting his action.

1849.
 GRAHAM
 v.
 MAXWELL.
 —
Statement.

where the debt was contracted (*a*), but which was not recoverable by the laws of *England*. Upon being informed of the decree, he carried in his claim before the Master, but found some difficulty in substantiating it, as all the witnesses were in *Scotland*, and the creditor could not compel them to give evidence in the Master's office; and the expense of prosecuting his claim before the Master would, as he alleged, exceed the expense of a trial of the action in *Scotland*. Under these circumstances, he declined to discontinue the action, and the Defendant then applied to the *Vice-Chancellor of England* for an injunction to restrain him from continuing it, which application his Honor granted, with costs.

Argument.

Mr. *Pole*, on behalf of Dr. *Moffatt*, now moved before the *Lord Chancellor* to discharge the injunction. He contended, that, in such a case as the present, the creditor ought to be allowed to proceed with the action, and he was willing to do so upon the terms that no execution should be issued; that the object was, to ascertain whether there was or was not a debt; that the decision upon the point must depend on the law of *Scotland*. *Jones v. Geddes* (*b*) was not an administration suit, but a suit to set aside a security, and therefore that decision would not rule this case.

As to the costs of the application to the *Vice-Chancellor* which the creditor had been ordered to pay, Dr. *Moffatt* had not been served with any subpoena in this suit; and the power of the Court to order payment of costs by any person who had not been brought within its jurisdiction by a subpoena was a matter of question; and such an order

(*a*) Vide case of Dr. *Russell* v. 1717, Dict. of Decisions, 11,419
 Sir *James Dunbar*, 7th February, (*b*) 1 Ph. 724.

was quite contrary to the practice of the Court: *Jones v. Jones* (a); *Earl of Portarlington v. Damer* (b).

1849.
GRAHAM
v.
MAXWELL.
—
Judgment.

The LORD CHANCELLOR said, that there was no doubt upon the principle on which the creditor's claim ought to be decided; but he thought Dr. *Moffatt's* proceeding was premature, as the Master had not yet come to any decision. Under the decree in the administration suit, all the creditors were to go in and establish their claims. If there was any difficulty, the Court would in proper cases allow an action to be brought; but the Court would not do so until it saw some special circumstances to require such a step. If leave were given in this particular instance, the Court must decide, that, whenever the cause of action arose out of the jurisdiction of the Court, the action might go on. It arose in this case in *Scotland*, and therefore the law and practice of *Scotland* must be considered in adjudicating upon the validity and the amount of the claim; and the Master, in deciding upon the claim of Dr. *Moffatt*, would consider all the circumstances connected with it, and if he thought it required investigation elsewhere, the Court would allow the action in *Scotland* to be proceeded with. He must decide against the application; and the only doubt he felt was as to the costs of it.

Mr. *R. Palmer* and Mr. *Cotton* for Mrs. *Maxwell*:—

Argument.

The claimant has gone in under the decree, and attempted to establish his claim before the Master. He has, therefore, taken the benefit of the decree; but, when he finds a difficulty in proving his demand, then he declares his intention to go on with the action. He has rendered the application to the Court necessary; and, as the Court holds that the application was a proper one, the claimant

(a) 5 Sim. 678.

(b) 2 Ph. 262—265.

1849.
 GRAHAM
 v.
 MAXWELL.

is the proper party to pay the costs of it: *Beauchamp v. The Marquis of Huntley(a)*.

Judgment.

The LORD CHANCELLOR said, that the only question was, whose conduct rendered the expense of the application necessary, and the Court ought to make them pay the expense incurred thereby. As to the jurisdiction of the Court in such a case, there could be no doubt. A creditor came before the Master, and then harassed the parties by his own action in *Scotland*. He made this application necessary, in order to prevent the estate from being wasted. His Lordship thought, therefore, the *Vice-Chancellor's* order was right in all respects, and that this application must, consequently, be refused, with costs.

(a) Jac. 546.

Nov. 9th.

SMITH v. PINCOMBE.

An order obtained by a Defendant for the examination of a co-Defendant as a witness, need not be served on the Plaintiff.

THIS was a motion on behalf of the Plaintiff, to suppress depositions. The same application had been first made to the *Vice-Chancellor of England*, who refused it, with costs.

Where a Plaintiff's solicitor knew the names, &c. of the witnesses who were examined before

The witnesses had been examined under a commission in *Devonshire*, in August, 1848, and publication passed in November. One of the witnesses, whose depositions were sought to be suppressed, was a Defendant. A co-De-

a Commissioner, and was at the inn where the examination took place, but had not received any notice respecting them from the other side, an application to suppress the depositions after publication, no objection being made at the time, was refused, with costs.

Where witnesses are to be examined before a Commissioner, whether it is necessary to give notice to the other side, of the names, &c. of the proposed witnesses, *quære*.

fendant, on whose behalf he had been examined, had obtained an order for leave to examine him as a witness, but had not served the order on the Plaintiff; and, upon the ground that such service was necessary, the Plaintiff now moved that the depositions should be suppressed.

1849.
SMITH
v.
PINCOMBE.
Statement.

Two other witnesses, whose depositions were also sought to be suppressed, had been examined, but no notice of their names and residence had been given to the Plaintiff's solicitor, who stated that he had no knowledge of the intention of the Defendant to examine them. On the other side it was stated, that the Plaintiff's solicitor was at the inn where the examination was taken, and was fully aware of all the proceedings.

Mr. *James Parker* and Mr. *Terrell*, in support of the motion, contended, as to the first point, that notice of an order to examine a co-Defendant should be given to the Plaintiff's solicitor: Daniell's Chanc. Prac. 853; Hinde's Chanc. Prac. 357; *Mulvany v. Dillon* (a).

Argument.

[The LORD CHANCELLOR.—We cannot take an Irish decision as a rule for the practice of this Court.]

That the Court required orders to be served, when the justice of the case rendered it proper: *Taylor v. Harrison* (b), *Dearman v. Wych* (c); and acted with great strictness respecting the examination of witnesses: *Earl Nelson v. Lord Bridport* (d); and the delay of the Plaintiff in making this application was not such as to be prejudicial to him: *Lord Mostyn v. Spencer* (e); that, if the Plaintiff had

(a) 1 Ball & B. 413.

(b) 1 My. & Cr. 274.

(c) 4 Id. 550.

(d) 7 Beav. 195.

(e) 6 Id. 135.

1849.
 SMITH
 v.
 PINCOMBE.
 —
 Argument.

cross-examined the witnesses, he could not afterwards have objected to him as a witness, if no order to examine him had been obtained: *Ellis v. Deane*(a); and that, as to the second point, when an examination took place before the Examiner, the witnesses used, under the old practice, to be produced to the clerk in court of the opposite party; and that the 26th Order of Lord *Lyndhurst*, in 1842, required notice of the name and description of the witness to be given to the other party; and the same principle applied to witnesses who were examined under a commission; and it was the practice to give such information to the solicitor on the other side: *Newland's Chanc. Prac.*, p. 417, 3rd edit.

Mr. *Rolt* and Mr. *Follett*, contra, stated that it was ascertained from the Secretary at the Rolls, that an order for leave to examine a co-Defendant used formerly to contain the words, "hereof give notice forthwith," but that the point was mentioned to Sir *J. Leach*, who decided that it was unnecessary, and that, from that time, those words had always been omitted; and that there was no order of the Court which required such notice to be given.

As to the second point, they contended that the Plaintiff's solicitor was fully aware, at the time of the examination, that the parties were being examined as witnesses, and that there was no necessity for giving him notice of their names. Such notice was required when the examination was before the Examiner, but that no such notice was requisite when the examination was before a Commissioner in the country; and that the delay of the Plaintiff, in bringing the case before the Court, would prevent him from succeeding in this application.

(c) 3 Moll. 51.

The LORD CHANCELLOR:—

The first ground is displaced by the information which the Court has received as to the existing practice. It was ascertained that a former Master of the Rolls decided that no service of the order for a Defendant to examine a co-Defendant was necessary, and that, from that time, the form of the order which directed such service has been discontinued. The established practice is, that such orders are now necessary to be obtained, but that, when obtained, it is not necessary to serve them.

1849.
SMITH
v.
PINCOMBE.
Judgment.

As to the second part of the application, it turns on a question of fact; but, before that point is entered into, the party ought to satisfy the Court that there was neglect on the part of the Defendant in not giving notice of the names of the witnesses; but the Plaintiff has altogether failed in that respect, because the 42nd Order contains no provision as to the practice relating to Commissioners in the country. Be that as it may, I give no opinion at all upon it; but nothing is more clear than that, according to the principles and practice of this Court, if a party, who knows at the time who the witnesses are, makes no objection until he has obtained an inspection of the depositions—if with a full knowledge of all the alleged irregularities he so conducts himself, the Court will not assist him in suppressing the depositions. The question, therefore, comes to the matter of fact. [His Lordship then entered on an examination of the affidavits, and stated that he was satisfied from them that the solicitor of the Plaintiff was quite aware who the witnesses were; and he, therefore, refused the motion, with costs.]

1849.

Dec. 7th.

In re THOMAS IREDALE, a Lunatic.

The former reports of the debts of a lunatic having been lost, the Master in Lunacy was directed to receive and consider any secondary evidence as to debts. The Master made his report accordingly, but did not therein state the grounds upon which he proceeded; whereupon it was referred back to the Master to state the evidence on which he based his report.

Money for the discharge of the debts of a lunatic under 10*l.*, will not be directed to be paid to the solicitor, but to the committee of the lunatic.

THIS was a petition, seeking the confirmation of the Master's report, as to debts found due from the lunatic.

The Master was directed by an order in the lunacy to receive and consider any secondary evidence as to debts, the former reports having been lost. The Master had made his report, in pursuance of the order, and had set forth in the 3rd schedule thereto a list of the debts due from the lunatic, some of which were under 10*l.* The former reports were obtained, and had afterwards been lost by the committee; and, in the present case, the Master had only the drafts before him.

The LORD CHANCELLOR having observed that the drafts were not evidence in themselves, it was stated by Mr. *Bacon* and Mr. *Rogers*, who appeared in support of the petition, that there was an affidavit filed shewing that the drafts were the instruments from which the former reports were engrossed.

The LORD CHANCELLOR:—

Judgment.

Then the Master does not state the only material evidence there is. It must appear upon the face of the order that there is some foundation for it; whereas there is nothing upon the present report to that effect. The facts in the affidavit must be stated in the order. It would be quite irregular to make an order upon a report in which there are no grounds stated to authorise it; and as to the debts

Under 10*l*., the money for discharging them must be paid to the committee, not the solicitor.—Secretary of Lunatics' Minute Book, No. 37.

1849.
In re
IREDALE.

FITCH v. ROCHFORT.

April 19*th*,
20*th*, & 21*st*.

THIS was an application to the *Lord Chancellor*, by way of appeal, to dissolve an injunction which had been granted by the *Vice-Chancellor of England*, to restrain the Defendant, his servants and agents, from selling, or causing, or being in any way concerned in the selling or exposing for sale, of the several articles of plate and jewellery described in the catalogue mentioned in the bill.

The Plaintiff, Mrs. *Fitch*, was entitled for her separate use to certain articles of plate and jewellery, which she had deposited with the Defendant, who was a pawnbroker, in *London*, as a security for monies advanced by him to her. These advances had been made on several separate occasions, and they amounted, at the end of November, 1845, to 1383*l*., and that sum still continued due.

The Defendant had advertised these articles, together with several other articles, for sale by auction on the 7*th* of March, 1849, and had caused a catalogue to be printed containing a description of them.

The Plaintiff thereupon filed this bill on the morning of the day of sale, alleging that it had been expressly agreed

A loan of money exceeding 10*l*. (which was held not to be a pawnbroking transaction), upon the security of goods, upon such terms as to interest, &c. as are authorised by the usury laws (2 & 3 Vict. c. 37), is not invalid merely because the lender is a pawnbroker.

A loan by a pawnbroker of money exceeding 10*l*., upon the security of goods deposited, is not a pawnbroking transaction, merely on account of the character of the lender, nor because the agreement entered into reserves interest at 3*d*. a month for every 20*s*. lent, and stipulates, that, in case the goods are sold, the surplus shall be kept by the

lender, if not claimed within three years, and that the goods may be delivered up to any party who produces the duplicate of the agreement and pays the debt; although these are the usual stipulations in pawnbroking transactions.

Where an *ex parte* injunction has been dissolved on the ground of misrepresentation or concealment, the Plaintiff is not thereby precluded from applying again for an injunction on the merits.

1849.
FITCH
v.
ROCHFORD.
—
Statement.

between her and the Defendant, that these articles should not be sold, but retained by him until she had repaid the debt. The bill charged, that the Defendant was not entitled to sell them as unredeemed pledges, because the sums advanced exceeded the amount which was authorised by the Pawnbrokers' Act to be lent by pawnbrokers. The bill prayed for an injunction to restrain the sale.

An affidavit was filed in support of the bill, and an *ex parte* injunction granted on the morning of the day of sale. An application was afterwards made to the *Vice-Chancellor* to dissolve it. It appeared that the Plaintiff had signed several agreements, by which she expressly gave the Defendant a power of sale, in case she made default in redeeming the property by a fixed time. The *Vice-Chancellor*, however, refused to dissolve the injunction, and the Defendant thereupon renewed the application to the *Lord Chancellor*. His Lordship said, that, as the Plaintiff had suppressed so material a fact when she applied for the injunction, it was quite contrary to the practice of the Court that she should be allowed to keep it, whatever the merits of the case might be; and he therefore dissolved it.

The Plaintiff then applied to the *Vice-Chancellor* for an injunction, on the merits of the case, and insisted that the contracts were signed by her at the Defendant's shop, without her being aware of the effect of them, and under the belief that she was merely complying with some of the usual forms adopted in pawnbroking transactions. His Honor granted an injunction, which the Defendant now moved before the *Lord Chancellor* to dissolve.

It appeared from the affidavits of the Defendant, that, previously to November, 1845, the Defendant had advanced monies to the Plaintiff upon five several occasions, and

that they amounted altogether to 1105*l.* 19*s.*; and that, on each occasion, the Plaintiff had signed a contract giving to the Defendant a power of sale; that, in November, 1845, she received a further advance of 200*l.*, making, with the previous advances and interest, 1383*l.*; and that she then signed a contract giving the Defendant power to sell the articles, if default was made in payment at the expiration of six months; that the monies were not repaid at the time fixed; and that, at the request of the Plaintiff, the articles were then divided into nine different parcels, in order that he might redeem any one separately; and that she then signed nine contracts, which were all similar in terms to the following:—

“Contract, No. 1—Duplicate.—I, Mrs. *Fitch*, of *York-street*, hereby authorise Mr. *Frank Rochfort*, of No. 35, *Bruder-street, Golden-square*, twelve months after this date, if not sooner redeemed, to sell by auction or private contract the articles specified on the back hereof, my property, on security of which he has this day lent me 678*l.*, at interest at the rate of 3*d.* per pound sterling per month, redeemable by me during the first month, paying one month’s interest at that rate, and, during any future half-month, paying any interest at that rate, to the end of the current half-month; and if the articles be sold as authorised, Mr. *Rochfort* is out of the proceeds to pay all expenses, and the principal and interest at the rate above mentioned, to the day of sale, and to pay the surplus (if any) to me, if demanded within three years. But in case of any deficiency on sale of this or any other property deposited by me with him, I agree to repay such deficiency. Until sale, Mr. *Rochfort* is empowered by me to deliver the articles to any person producing the duplicate hereof, upon his or her paying him principal, interest, and all expenses. Dated this 27th day of November, 1845.

“ELLEN FITCH.”

1849.
FITCH
v.
ROCHFORD.
Statement.

1849.
 FITCH
 v.
 ROCHFORD.
 —
Statement.

These contracts were all dated either in November or December, 1845; and each of them was for an amount exceeding 10*l.*, and was partly written and partly printed, and contained in a book belonging to the Defendant, in which no pawnbroking transaction was inserted; and a duplicate of each of the contracts was given to the Plaintiff at the time she signed them. Several communications took place between the Plaintiff and the Defendant, within the last three months, respecting a sale, and the comparative advantages of a private sale or public auction; and the Defendant had sent her a catalogue on the 3rd of March last. The Defendant altogether denied that there was any agreement or understanding that the articles were not to be sold in case of default in paying the money. It was also stated, that several other things were pledged with the Defendant, for which the Plaintiff received the ordinary pawnbroker's tickets.

Argument.

Mr. *Rolt* and Mr. *Wright* for the Defendant:—

As the Plaintiff has brought all the facts of the case before the Court already, and has obtained one injunction, which was afterwards dissolved, she ought not to be allowed to put the Defendant to the expense of arguing the same question a second time. Whether the first injunction was lost by misrepresentation, or for any other reason, is immaterial to the Defendant.

[The LORD CHANCELLOR.—When the motion to dissolve the *ex parte* injunction came before the *Vice-Chancellor*, he should have refused to hear it on the merits. But as that injunction was dissolved on other grounds, you can hardly contend that the Court ought not to interfere on an application upon the merits. A party who obtains an injunction through misrepresentation or concealment of

the facts, ought to lose it; but he may apply again upon the merits.]

The argument was then continued upon the merits.

1849.
 FITCH
 v.
 ROCHFORD.
 —
 Argument.

The usury laws, which now exist under the 2 & 3 Vict. c. 37 (a), allow any contract for a loan above 10*l.* at any rate of interest, provided it is not a loan upon the security of land, or any estate or interest therein. This transaction is, therefore, free from any objection founded on the usury laws. The question then is, whether the Defendant, being a pawnbroker, is incapacitated on that account from making a loan, which might be made by any other person not being a pawnbroker. The Pawnbrokers' Act (39 & 40 Geo. III, c. 99), allows pawnbrokers to lend money not exceeding 10*l.* upon pledge, at any interest not exceeding 3*d.* for every 20*s.*, per calendar month. Loans of higher amount were regulated by the existing usury laws; and when that Act was passed, the then existing usury laws did not allow so high a rate of interest to be taken on loans of sums exceeding 10*l.* But the present usury laws do allow as high a rate of interest on larger sums, and there is nothing in the Act of 2 & 3 Vict. which prevents a pawnbroker from doing what any other person is at liberty to do. *Pennell v. Attenborough* (b) decided that transactions above 10*l.* were not within the Pawnbrokers' Act. The 30th sect. of the Pawnbrokers' Act expressly exempts persons who should lend money upon pawn or pledge at the rate of 5*l.* per cent. only; and, therefore, that Act assumes that a pawnbroker may lend money independently of the Act, and that it does not necessarily follow, that every loan by him must be made in the character of a pawnbroker. The Pawnbrokers' Act gives very minute and particular directions as to the keeping of

(a) Continued till 1st January, 1851, by 8 & 9 Vict. c. 102.

(b) 4 Q. B. Rep. 868.

1849.
 ———
 FITCH
 v.
 ROCHFORD.
 ———
Argument.

books by pawnbrokers, and respecting the entries to be made of every pawnbroking transaction. But this was not treated as a transaction of such a nature, and none of those entries were made. The 2 & 3 Vict. c. 37, s. 3, enacts, that nothing therein contained shall extend to repeal or affect any Statute relating to pawnbrokers. If the effect of that clause is to extend the Pawnbrokers' Act to loans by pawnbrokers, exceeding 10*l.*, it becomes a most material enacting clause.

Mr. *Malins* and Mr. *Swift* for the Plaintiff:—

The Pawnbrokers' Act gave certain privileges to the parties who availed themselves of it. They might take 3*d.* per month interest for every 20*s.* lent; if they sold the pledge, they might keep the surplus if it was not claimed within three years, and the pledge must be given up to the party who produced the duplicate. All these advantages are stipulated for in the present case. The transaction took place at the shop of the pawnbroker, and the contracts were signed on different pages of a book kept by him. All these circumstances shew that it was a pawnbroking transaction; and the Defendant is not entitled to take advantage of the Pawnbrokers' Act for one purpose, and repudiate it for other objects. The 5th sect. of the 25 Geo. III, c. 48, contains a definition of a pawnbroker, and it enacts, that all persons who shall receive by way of pawn any goods, for the repayment of money lent thereon, shall be deemed pawnbrokers within the meaning of the Act. Being a pawnbroking transaction, and for an amount greater than 10*l.*, this loan is invalid. It has sometimes been attempted to make an advance of a large sum by means of a series of loans, each being 10*l.* or under; but all such devices have failed: *Cowie v. Harris*(a); *Armstrong v. Armstrong*(b); *Tregoning v. Attenborough*(c); *Fergusson v. Norman*(d).

(a) Moo. & M. 141.

(b) 3 My. & K. 45.

(c) 7 Bing. 97; 4 Moo. & P. 722.

(d) 5 Bing. N. C. 88.

[The LORD CHANCELLOR.—If advances upon goods deposited are not within the scope of the usury laws, then the law would be in this state: that a man may borrow 100*l*. upon his personal security, and give any amount of interest upon it; but if he has in his possession personal property which he may pledge, and which may reduce the rate of interest from 10*l*. to 6*l*. per cent., he is not permitted to use it at all. That would be the inevitable consequence. It is not within the Pawnbrokers' Act, and therefore he cannot do it: he can only borrow money at 5*l*. per cent., or he cannot pledge the property.]

1849.
FITCH
v.
ROCHFORD.
—
Argument.

Then, by the 1st sect. of the 2 & 3 Vict. c. 37, the enactments of that Statute are expressly limited to loans above 10*l*., and therefore could not affect pawnbrokers, whose loans must not exceed that sum; but that Act, by the 3rd sect., expressly states that nothing therein contained shall repeal or affect any statute relating to pawnbrokers, and that clause was altogether unnecessary, unless it meant that pawnbrokers, after that Act, were to remain in the same position as before(*a*).

Mr. *Rolt* was not called upon to reply.

The LORD CHANCELLOR:—

April 20th.
—
Judgment.

No doubt this is an extremely important case, because of the effect it has on the community at large. I do not propose to make any order, until I have had the opportunity of looking into the authorities more distinctly; but as the facts are all before me, I will state what occurs to me now.

(*a*) The clauses referred to in the following:—39 & 40 Geo. III, the course of the argument were c. 99, ss. 2, 6, 17, 20.

1849.
 FITCH
 v.
 ROCHFORD.
 —
Judgment.

It does not appear to me that there is any doubt upon the construction of the Act itself, finding it confirmed by two decisions at common law. The thing lies in a very narrow compass. Before the Pawnbrokers' Act, nobody could take more than five per cent.; that was the limit which was always imposed upon loans. But it was found that it was very inconvenient and injurious to poor people; and, therefore, not for the benefit of the pawnbroker, but for the benefit of poor persons who had very little credit in the way of money to assist themselves with, the law was relaxed, and certain provisions introduced for their protection; and it was for their benefit that the rate of interest was settled.

The Pawnbrokers' Act, therefore, which is now the existing law, (the 39 & 40 Geo. III, c. 99,) authorises parties to advance sums under 10*l.*; and it then contains various regulations for the protection of parties lending money, applicable to loans under 10*l.* The 30th sect. says that which, if it stood alone, would only have applied to loans under 10*l.*, and would have left the law as it stood before. Now this is the language of the sect.: "that nothing in this Act contained shall extend, or be construed to extend, to any person," (including pawnbrokers, of course,) "or persons whomsoever, who shall lend money to any person or persons whomsoever upon pawn or pledge, at the rate of 5*l.* per cent. per annum interest, without taking any further or greater profit for the loan or forbearance of such money lent, on any pretence whatsoever." Here, then, was a law regulating advances of money under 10*l.*: *bonâ fide* under 10*l.*, of course. There is a fraud in advancing money at different times, making it one loan: but *bonâ fide* advances of money at one time shall be within the provisions of the Act. There shall be certain protection to the person lending, and to the person borrowing; but any person lending money above 10*l.* at 5*l.* per cent. cannot be within the operation of the Act. So

that the pawnbroker, within his shop, with all the appurtenances belonging to a pawnbroker, on any person coming to him, and saying, "I want 500*l.* at 5*l.* per cent.," might lend it to him. There is no doubt as to that, because of the 30th sect.; and, the 30th sect. being found there, of course it gets rid of all doubt: and that money he might lend upon pledges of property.

1849.
 FITCH
 v.
 ROCHFORD.
 —
Judgment.

Pawnbrokers, then, being under no disabilities, except that they were obliged to conform to the provisions of the Act, if they advanced money under 10*l.*, are, so far as larger loans are concerned, on the same footing with other subjects of her Majesty.

We have also two decisions in the Court of Common Pleas, which establish that the pawnbroker is confined to sums under 10*l.*; and we have also a judicial decision that the Act alludes only to transactions under 10*l.* If that be so, then all transactions above 10*l.* are to be looked at just as if the Pawnbrokers' Act did not exist at all. If that Act did not touch it, then the old law applied.

Then came the Act now in force with respect to usury, which enacts, that the usury law shall not affect "any contract for the loan or forbearance of money above the sum of 10*l.* sterling;" that is to say, it deals with all matters not within the Pawnbrokers' Act; and then again, for further security, and in order to avoid the possibility of mistake, it says: "that nothing herein contained shall extend, or be construed to extend, to repeal or affect any Statute relating to pawnbrokers, but that all laws touching and concerning pawnbrokers shall remain in full force and effect, to all intents and purposes whatsoever, as if this Act had not been passed." Then, what are the laws relating to pawnbrokers? Why, the laws relating to pawnbrokers are confined to loans under 10*l.*

1849.
 FITCH
 v.
 ROCHEPORT.
 —
Judgment.

The 2 & 3 Vict. c. 37, for greater caution, says, that all laws relating to pawnbrokers shall remain where they are. Therefore, those enactments relating to pawnbrokers are clearly to be confined to transactions under 10*l*. A pawnbroker, before that Act, might advance money at 5*l*. per cent. upon goods deposited with him. If he did so, he would be acting as a pawnbroker; but he was not, within the Pawnbrokers' Act, acting as a pawnbroker, because he was expressly excepted. He might lend money upon the same terms as any other person might do, provided it was above 10*l*. Now, the new Act says, that any one in the world may advance money above 10*l*. without being interfered with by the old law. The pawnbroker is no exception to the rule of law. All persons are exempted from the operation of the usury law above 10*l*. Why, then, are pawnbrokers to be excepted? They are not excepted in terms; and, if they are not so excepted, there is nothing to make them liable to incapacity which they were not under at all by the former law, and so they are not liable now in transactions above 10*l*. Then, we have the decision of the Court of Exchequer, in *Turquand v. Mosedon* (a), which holds, (and which you cannot otherwise hold, in my opinion,) that loans on deposits above 10*l*. are protected by the 1st sect. of the 2 & 3 Vict. c. 37; and we have the decision of the Court of Queen's Bench, in *Pennell v. Attenborough* (b), a case which, for all useful purposes, is the same as this, and which is, under the circumstances, identical with the present case. It applies to a transaction of this sort: "A special contract with a pawnbroker for a loan above 10*l*. is as lawful a transaction as if he was not a pawnbroker." That is the whole case that I have before me; and it seems to me perfectly clear, therefore, that the Pawnbrokers' Act has nothing whatever to do with this transaction. The transaction is just as binding as if the party advancing the money were not a pawnbroker; and, as to the contract which was entered

(a) 7 M. & W. 504.

(b) 4 Q. B. Rep. 868.

1849.
 FITCH
 v.
 ROCHFORD.
 Judgment.

into, the Defendant appears to me to be acting in conformity to it; and the question is, whether that contract was a legal or an illegal one. I think, upon the plain construction of the Statute, and the authorities referred to, that it is a legal one, and that the Defendant is under no liability by reason of his being a pawnbroker; and it certainly, therefore, comes within the decision of the Court of Queen's Bench.

The only thing upon which there is any doubt, is the revenue law. What struck me at first, was the privilege which the revenue law seems to give to a pawnbroker; but that does not affect the case. A person might take out a license to be a pawnbroker: but, it would be an unfortunate position for a man to be in, to require a license for doing that which all the rest of the world might do without a license. That might probably have been an error in the Act, which does not exist now. The question might arise under the Revenue Act, whether a particular individual was liable or not. However, I am not looking at that. I am looking at this question alone: How far a man who is a pawnbroker is liable for doing that which all the rest of the world may do?

It was not intended to impose a duty on any one, except upon those who come within the description of a pawnbroker, and only upon them when they availed themselves of the benefits given by the Pawnbrokers' Act. That would not affect the question: it would be a different matter altogether. It would be a great hardship upon parties if that were so.

On the following morning the *Lord Chancellor* discharged the *Vice-Chancellor's* order, and dissolved the injunction, and gave the Defendant his costs of the motion below.

— 100 —

... and the ...
... bill, ...
... against ...
... 19th April ...
...
... the bill ...
... the agreement ...
... served with ...

... at the hearing ...
... the Plaintiff appeared ...

... original bill, that ...
... will devised and bequeathed ...
... afterwards the wife of ...
... in Herefordshire and ...
... personal estate, to and for her ...
... first only to the payment of his ...
... expenses, the costs and charges of ...
... payment of the several legacies ...
... *inter alia* of a legacy of 2000*l.* ...
... to be paid her whensoever ...

... previously to the marriage of the Pl ...
... between R. and the Plaintiff's late wife, ...
... R. from the payment of the same legacy, ...
... or need or will, to convey or devise also ...
... to take effect on R.'s decease. The Pl ...
... W.'s marriage with R. — *Held*, that W. ...
... with constructive notice of that which, (if ...
... the Plaintiff had an equitable title by contr

... 1890, recognised and confirmed.

might think proper; that the will was proved by the testator's widow, who was his sole executrix, shortly after the testator's death; that the widow, as such executrix, possessed herself of the testator's personal estate, and thereout paid the testator's funeral and testamentary expenses and all his debts, including debts on mortgage of the testator's devised real estates, and also all the legacies, except the legacy of 2000*l.* given to *Elizabeth Stone*; that, in the month of October, 1835, *Elizabeth Stone* intermarried with the Plaintiff, and died in the month of June, 1836, and that, thereupon, the Plaintiff became her sole legal personal representative; that, on the 8th of December, 1843, the Defendant, *John Watts*, and *Rebecca Unett* intermarried, and thereupon an indenture of that date was executed by those parties, by which the real estates devised by the will of *C. B. Unett*, and all the interest of *Rebecca Unett* therein, were conveyed to certain uses; and that, by virtue thereof, *John Watts* had become and was seised of the legal estate of inheritance in fee-simple therein; and that *John Watts*, on his marriage, possessed himself of the whole of the testator's personal estate remaining undisposed of, and converted the same to his own use, and had admitted assets sufficient for payment of the legacies bequeathed by the testator. The original bill then charged that, by the testator's will, the legacy of 2000*l.* was payable out of the testator's real estates; that the Defendants at times alleged that *Elizabeth*, the late wife of the Plaintiff, in the year 1831, in some manner released the legacy of 2000*l.* to *Rebecca Watts*; and the bill charged, that if any such release was then executed, the same was afterwards abandoned or cancelled by *Rebecca Watts*, and the right of *Elizabeth Penny* to the legacy was afterwards recognised as still subsisting by *Rebecca Watts*; that the release became void by failure of the consideration for the same; and that the Defendants, at other times, asserted, that, at a subsequent date, by some instrument in writing, *Elizabeth Penny* released

1849.
 PENNY
 v.
 WATTS.
 —
Statement.

1849.
 PENNY
 v.
 WATTS.
 —
Statement.

the legacy to *Rebecca Watts*, in consideration of certain real estate agreed to be conveyed by her to *Elizabeth Penny* and the Plaintiff, her then intended husband, whereas the Plaintiff charged that such real estate was never, in fact, conveyed to the Plaintiff and his late wife, or either of them. The original bill then prayed payment to the Plaintiff of the legacy, and the interest due thereon, out of the personal estate of the testator, or, if that should be found insufficient, then that the deficiency might be raised out of the testator's devised real estates.

The Defendants, in their answer to the original bill, (amongst other things) admitted that part of the testator's devised real estates was subject to the payment of a sum of 2260*l.*, by way of mortgage; and stated their belief that, during the months of July, August, September, and a part of the month of October, 1831, the Defendants, *Rebecca Watts* and *Elizabeth Penny*, then *Elizabeth Stone*, were resident at *Sandgate* in the county of *Kent*; and that, at some time during that period, prior to the 30th of August, 1831, it was agreed between the Defendants, *Rebecca Watts* and *Elizabeth Penny*, who was then of the age of thirty-one years, that *Elizabeth Penny* should release to *Rebecca Watts* the legacy of 2000*l.*; and that *Rebecca Watts* should by her will devise to *Elizabeth Penny* a part of the real estates devised to *Rebecca Watts* by the will; that *Elizabeth Penny* expressed her wish that an estate, called *Broadward Hall*, which had been the place of residence of the testator, and where *Elizabeth Penny* had been residing, should be devised to her by *Rebecca Watts*, and which, she stated, she preferred to the property in *Herefordshire*, although the latter was of greater value; that *Rebecca Watts* acceded to this wish of *Elizabeth Penny*, and agreed to devise *Broadward Hall* to her; that, in pursuance of that agreement, *Rebecca Watts*, in August, 1831, at *Sandgate*, made her will and devised that estate to *Eliza-*

CASES IN CHANCERY

that think proper; that the will was made by the testator's widow, who was his sole executrix at his death; that the widow, at and after the death of the testator, possessed herself of the testator's personal estate, and paid the testator's funeral and testamentary expenses, and his debts, including debts on mortgages of certain leased real estates, and also all the residue of the legacy of 2000*l.* given to *Elizabeth Stone* in the month of October, 1835, *Elizabeth Stone* being the Plaintiff, and died in the month of June, 1836; thereupon, the Plaintiff became her executor and representative; that, on the 8th of December, 1836, the Plaintiff, *John Watts*, and *Rebecca Unett* being the Defendant, executed an indenture of that date, between the parties, by which the real estate of the testator, *J. B. Unett*, and all the interest of *Rebecca Unett* therein, were conveyed to certain uses; and the said *John Watts* had become and was being seized of the said inheritance in fee-simple therein; and the said *John Watts*, by his marriage, possessed himself of the testator's personal estate remaining undistributed; and he sold the same to his own use, and applied the proceeds thereof for payment of the debts of the testator. The original bill then contained a statement of the testator's will, the legacy of 2000*l.* given to *Elizabeth Stone*, and the testator's real estates; that the Plaintiff alleged

that *Elizabeth*, the late Plaintiff, died in 1831, in some manner, and that the said *John Watts*; and the bill was then executed and cancelled by *Rebecca Unett*; and the legacy was paid by *Rebecca Unett*; and of the consideration, at other times.

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1849.
 PENNY
 v.
 WATTS.
 —
Statement.

Elizabeth Penny had given up her right to the legacy, and that, in lieu thereof, *Rebecca Watts* had by will left her *Broadward Hall*; but *Rebecca Watts* stated that she was not versed in matters of law, or the nature or forms of legal proceedings or assurances, and did not recollect by what proceeding or assurance or other means the legacy had been so given up; and the Defendant's memory being defective from age, she had altogether forgotten the release, and therefore she was unable to inform, and did not inform, the Defendant *John Watts* of it."

The Plaintiff, by his second bill, after setting forth the substance of the original bill, alleged, that, in the year 1835, when the marriage between the Plaintiff and his late wife was in contemplation, an arrangement was, at the suggestion of *Rebecca Watts*, then *Rebecca Unett*, entered into between her and the Plaintiff and the Plaintiff's then intended wife, to the purport in the agreement set forth; but that, although the Plaintiff, at the time when he so filed his original bill, remembered that an agreement had been duly entered into respecting the legacy and the real estate mentioned in the agreement, yet he was unable to trace or discover what had become of the instrument then executed, or any copy of, or extract from, the same, or to furnish sufficiently accurate information of the purport or effect thereof for the same to be stated in the original bill; and, under the circumstances aforesaid, the same was not stated in that bill, but a charge was introduced therein, with a view to obtain a discovery respecting the same from the Defendants, *John Watts* and his wife; that, since the death of the said *Rebecca Watts*, the Plaintiff had discovered (as the fact was) that *Rebecca Watts*, then *Rebecca Unett*, herself gave instructions to Mr. *Francis Marston*, her agent, to prepare, or cause to be prepared, on her behalf, the agreement for carrying the said arrangement into effect, which instructions Mr. *Marston* took down

in writing on the draft or copy of a will of *Rebecca Unett*, which will was made by her in the month of January, 1834; and that *Rebecca Watts*, then *Rebecca Unett*, read the instructions so written by Mr. *Marston* as aforesaid, and approved thereof, interlining in and adding to the same, with her own hand, the words following, that is to say: "and furniture in *Broadward Hall*," where the same occurs; that such instructions, with such additions as aforesaid, were in the words and figures following, that is to say: "Instructions for an agreement, 29th September, 1835, between Mrs. *Rebecca Unett* and Mr. *John Penny* and *Elizabeth Stone*, his intended wife.—Miss *Stone* to give up the 2000*l.* left her by the will of *Charles Bayley Unett*; and, in consideration thereof, and of the intended marriage, Mrs. *Unett* agrees to settle all the *Shropshire* estates, and furniture in *Broadward Hall*, upon her niece, and nephew *John Penny*, and to pay off *Llan* mortgage, to be settled by will or deed after the marriage; Mrs. *Unett* to keep possession of the estates for her life, and Mr. *Penny* and his intended wife to take them afterwards. Mrs. *Unett* reserves the *Herefordshire* estates, to make provision for her brother, Mr. *Stone*, and his daughters; but, after the decease of the survivor of them, she agrees to settle the *Herefordshire* estates upon her said nephew and niece, and their children and heirs, for ever." The bill proceeded to state, that, in pursuance of the instructions so given to Mr. *Marston*, he prepared and engrossed an agreement in writing, which was duly stamped, dated the 29th of September, 1835, and purported to be made between *Rebecca Unett* of the one part, and the Plaintiff and *Elizabeth Stone* of the other part; and that the same was duly executed by *Rebecca Unett* and *Elizabeth Stone*, in the presence of *Francis Marston* and *Lucy Hinde*; and that thereby the instructions given to the said *Francis Marston* were fully carried out. The bill then alleged, that the Plaintiff had lately, and since the death of *Rebecca Watts*, discovered (and it

1849.
 PENNY
 v.
 WATTS.
 —
Statement.

1849.
 PENNY
 v.
 WATTS.
 —
Statement.

was the fact) that *John Watts*, previous to and at the time of his marriage, was aware, and had heard and believed, and had reason to believe, that *Rebecca Watts*, having obtained possession of the agreement of September, 1835, at some time subsequently to the death of the Plaintiff's late wife, burnt and destroyed the same, without the knowledge or concurrence of the Plaintiff, in the presence of *Francis Marston*, who remonstrated with her, and informed her (as the fact was) that she could not annul the agreement, and that the same, though burnt and destroyed, was binding on her; and that the Plaintiff had, since the death of *Rebecca Watts*, discovered (and it was the fact) that *Francis Marston*, at the time when the agreement was so burnt and destroyed, had, and still had, in his possession, the draft from which the agreement was engrossed, and which was a true and correct copy, or some other true and correct copy, of the agreement, as signed and executed by *Rebecca Watts* and *Elizabeth Penny*, then *Elizabeth Stone*, as thereinbefore mentioned.

The bill charged, (amongst other things,) that if for any reason the Plaintiff should be deemed not entitled to, and could not obtain, the hereditaments and premises according to the terms and true intent and meaning of the agreement, then and in such case, the Plaintiff would be, and was entitled to, and ought to be paid by *John Watts*, personally and individually, the amount of the legacy of 2000*l.* and interest for the same, as a debt due from *John Watts*, and which he had become liable to pay on his own individual account, to the full amount of the legacy of 2000*l.* so given to *Elizabeth Penny*, together with interest thereon from the expiration of one year from the testator's death; and that the Plaintiff would be and was entitled, under the agreement and the circumstances aforesaid, to a lien for the same upon the hereditaments and premises comprised in the agreement, and so conveyed and assured,

s therein mentioned, to *John Watts*, which ought to be applied to pay the same to the Plaintiff; and, moreover, that the legacy and interest were, under the will, a charge upon the testator's real estate comprised in the indenture of the 8th day of December, 1843, and ought to be raised and paid thereout.

1849.
PENNY
v.
WATTS.
—
Statement.

In the answer of *John Watts* to the second bill was contained the following passage:—"Says, that, previously to the marriage of this Defendant to *Rebecca Watts*, he, the Defendant, was informed by *Rebecca Watts*, in a conversation with her, and he had ascertained, from a perusal of a copy of the will of her late husband, *C. B. Unett*, that she was entitled to the estates of the testator devised to her by the will; and this Defendant also, previously to his marriage, was informed by her in conversation, that, by agreement between *Rebecca Watts*, then *Rebecca Unett*, and *Elizabeth Penny*, then *Elizabeth Stone*, *Elizabeth Stone*, before her marriage with the Plaintiff, had given up her right to the legacy of 2000*l.*; and that, in lieu thereof, *Rebecca Unett* had by will left her *Broadward Hall*, as in the answer to the former bill mentioned; but the Defendant says, he positively denies, that, previously to his marriage, he did, by any conversations or conversation, save as aforesaid, or any inquiries or inquiry of *Rebecca Watts*, or any other persons or person, or by obtaining the perusal, or by perusal, of any writings or writing in her or any other persons' or person's possession, power, or otherwise, make himself in any manner acquainted with the state of her affairs, or any of them, or her proceedings with respect to the real or personal estate of the testator, or the administration thereof, or any such matters, or with the alleged rights or interests of the Plaintiff in respect thereof, or any of them, or all or any of the particulars in the said bill in this cause untruly alleged respecting the alleged agreement." There was no statement that the Plaintiff

1849.
 PENNY
 v.
 WATTS.
 —
Statement.

was in possession of *Broadward Hall*, or of any of the lands belonging thereto, as the tenant thereof; and the Defendant, in his answer to the second bill, insisted that he was a purchaser for valuable consideration without notice, and claimed the same benefit at the hearing of the cause as if he had pleaded that he was such purchaser for valuable consideration without notice, as aforesaid.

As to the question of notice, it appeared that the Plaintiff was in the occupation of *Broadward Hall* at the time of the Defendant's marriage with *Rebecca Unett*, and rented parts of the land belonging thereto, and he had resided there continuously from the date of his marriage with *Elizabeth Stone* up to that time. A draft copy of the agreement of the 29th of September, 1835, was proved by *Francis Marston*, who also deposed to the execution of the original agreement by *Rebecca Watts* (then *Rebecca Unett*) and *Elizabeth Stone*, and the circumstances connected therewith, and the subsequent destruction of the original agreement by *Rebecca Unett*, in the presence of *Francis Marston*, *Lucy Hinde*, a servant of *Rebecca Watts*, and an attesting witness to the agreement of 1835, deposed to her recollection of the transaction, but was not acquainted with the contents of the instrument, the execution of which she attested. As to a considerable portion of the devised estates, (affecting about 300*l.* a year of the rental,) the legal estate appeared to be outstanding in parties claiming under mortgages created by the testator, *C. B. Unett*.

On behalf of the Defendant, two letters, dated the 21st of November, 1843, and 28th of December, 1843, (the latter written after the Defendant's marriage with his late wife, *Rebecca Watts*,) and sent by the Plaintiff to *Rebecca Watts*, were adduced in evidence, both of which proceeded on the footing of the Plaintiff having no legal claim whatsoever to any part of *Rebecca Watts's* property, but, on the contrary,

shewed that the Plaintiff was dependent on her bounty. From other evidence, viz. the preparation of a will by *Francis Marston* for *Rebecca Unett*, in the year 1837, by which large benefits were given to the Plaintiff, and provisions made for the family of Mr. *Stone*, the father of the Plaintiff's deceased wife, and other circumstances, the Plaintiff's case, as to the agreement of 1835, seemed not to have a very solid foundation.

1849.
Penny
v.
Watts.
Statement.

Mr. *Bethell* and Mr. *Bazalgette* for the Plaintiff:—

Argument.

If the agreement entered into between the aunt and the niece was defeated by the act of the aunt, the consideration altogether failed, and in that event the Plaintiff is entitled to call for payment of the legacy of 2000*l.*, which is a charge on the testator's devised real estates. The learned Judge in the Court below appears to have overlooked the most material point in the case, namely, that the defence of a purchaser for valuable consideration without notice, arises only where the party setting up that defence has the legal title. Proper inquiries ought to have been directed by the Court below, to ascertain who had the legal estate at the date of the settlement. The other part of the case depends on a careful examination of the evidence taken in the cause, and whether that evidence is sufficient to induce the Court to think the Defendant had notice of the Plaintiff's claim, or such notice as ought to have put him on inquiry. If there be contradiction in the evidence adduced, the Plaintiff's bills at least ought not to have been dismissed, but instead of that course, a reference to the Master, or an issue, ought to have been directed, to ascertain how the facts stood. [Here counsel read the agreement of the 29th September, 1835, the evidence on that point, and also the short-hand notes of the judgment delivered in the Court below.] The Defendant is bound by the possession of the tenant as to any interest the tenant may have in the estate

THE LORD CHANCELLOR.

The Plaintiff, therefore, is entitled to the release of the Plaintiff's property, and the release is to be given to the Plaintiff, and the release is to be given to the Plaintiff, and the release is to be given to the Plaintiff.

The Plaintiff, therefore, is entitled to the release of the Plaintiff's property, and the release is to be given to the Plaintiff, and the release is to be given to the Plaintiff.

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The Plaintiff, therefore, is entitled to the release of the Plaintiff's property, and the release is to be given to the Plaintiff, and the release is to be given to the Plaintiff.

The LORD CHANCELLOR—That release would seem to have been cancelled, and a fragment only of it retained in the possession of the releasee.]

The letter of December, 1843, shews that release to be a release existing long posterior to the agreement, and the Defendant disproves the existence of any agreement which he could by possibility have had notice. The release of *Lucy Hinde* leaves the case just where it was,

(a) 1 Mer. 282.
(b) 16 Ves. 249.
(c) 3 Russ. 198.

(d) 5 My. & Cr. 63.
(e) 3 Bro. C. C. 264.

and no witness deposes positively to the agreement of 1835, except *Marston*, whose evidence is of such a character that the Court will not give any credit to it, after due consideration of the evidence adduced on the part of the Defendant. It is fair to ask where is the copy of the agreement that was given (as is alleged) to the Plaintiff's wife, it not being likely that Mrs. *Unett* would ransack the repositories of Mrs. *Penny* for the purpose of finding and destroying it, supposing it ever existed. In the actual state of the title, the defence of being a purchaser for valuable consideration without notice is conclusive, even if the titles of both parties (notwithstanding the allegation in the original bill, that on his marriage the Defendant became seised of the legal estate of inheritance of the testator's devised real estates) are to be deemed equitable; but the Defendant insists that the Plaintiff was not a tenant in possession of the estate. Next, the agreement of 1835 (if such really ever existed) amounts merely to a contract, whereas the Defendant relies on a deed of conveyance solemnly executed in his favour by his late wife. In *Tasker v. Small* (a), your Lordship's observations are as follow: "It was argued at the bar, that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property." And in *Brandlyn v. Ord* (b), Lord *Hardwicke* said "he never knew a man defend himself in this Court as a purchaser for a valuable consideration under articles only; if he is injured, he must sue at law upon the covenants in the ar-

1849.
 PENNY
 v.
 WATTS.
 —
Argument.

(a) 3 My. & Cr. 63, vide p. 70.

(b) 1 Atk. 571.

1849.
 PENNY
 v.
 WATTS.
 —
Argument.

ticles." In this case the Plaintiff was not a purchaser for valuable consideration.

[The LORD CHANCELLOR.—Whatever the Plaintiff's late wife became entitled to, he is entitled to.]

To give the Plaintiff title, the conscience of the Defendant must be affected, whatever his estate may be; whereas, in the present case, the Defendant by his answer denies any notice of the agreement of 1835: *Jerrard v. Saunders* (a), *Mitford's Pleading* (b), *Bowen v. Evans* (c). With reference to the alleged obligation of the Defendant to make proper inquiry, it may be observed, that, in the cases of *Daniels v. Davison* and *Allen v. Anthony*, there was an interest attached to the possession which the tenant then had; and in *Jones v. Smith* (d), Vice-Chancellor *Wigram* speaks of *Daniels v. Davison* as an extreme case (e).

[The LORD CHANCELLOR.—The present case is one of contract with Mrs. *Unett*, who was in possession of the estate.]

The mere possession of Mrs. *Unett* could give the Defendant no notice of the interest of Mrs. *Penny*; and notice of the alleged agreement of 1835 can scarcely be imputed to the Defendant, when the Plaintiff himself, at the date of his marriage, was ignorant of its existence. The cases of *Taylor v. Stibbert* (f), and *Crofton v. Ormsby* (g), shew that the party in possession of the estate must have an interest in it; whereas the possession of the Plaintiff, in the present case, was that of a party living with the owner of the

(a) 2 Ves. jun. 454.

(b) Page 274, 4th ed.

(c) 1 Jones & L. 178.

(d) 1 Hare, 62. Affirmed on appeal, 1 Ph. 244.

(e) Vide also the observations in 3 Sugd. V. & P. 470, 10th ed.

(f) 2 Ves. jun. 437.

(g) 2 Sch. & L. 600.

estate, and not the case intended by the authorities cited; and there is an utter absence of all evidence of personal notice to the Defendant of the Plaintiff's claim, as is alleged by the bill; and evidence of constructive notice is not admissible where personal notice only (as we contend is the case here) is alleged by the bill: *Wilde v. Gibson* (a).

1849.
Penny
v.
Watts.
—
Argument.

Mr. *Bethell*, in reply, contended, that if the Court entertained any doubt about the existence of the agreement of 1835, the same ought to be the subject of an inquiry; that there was no ground for throwing discredit on *Marston's* evidence, who had been, for many years previously to Mrs. *Watts's* decease, her confidential adviser; that the evidence of *Lucy Hinde*, so far as it went, was confirmatory of *Marston's* evidence; that, inasmuch as the release was in a perfect form, according to the answer of the Defendant, down to the time of Mrs. *Penny's* decease in 1836, every reasonable conclusion must be drawn against the Defendant as to the present mutilated state of that document; that, according to the cases of *Wallwyn v. Lee* (b), and *Jackson v. Rowe* (c), there was no statement in the answer that amounted to a proper plea of purchase for valuable consideration without notice, the former case containing the true exposition of the law on that point; and that, as regarded the possession by the Plaintiff of *Broadward Hall* and premises, as the tenant thereof, it was proved that he was in such possession, and paid rent for some of the lands.

Mr. *Rolt*, in adverting to the case of *Jackson v. Rowe*, referred to the observations of the *Lord Chancellor* in the same case, on appeal, reported in 4 Russ. 514.

(a) 1 H. L. Cas. 605.

(b) 9 Ves. 24.

(c) 2 S. & S. 472.

1849.

PENNY

v.

WATTS.

April 21st.

Judgment.

The LORD CHANCELLOR:—

This case came on under very peculiar circumstances, involving, as to the questions of fact, matters of very great difficulty in coming to any satisfactory conclusion. The judgment of the Court below did not proceed on these facts at all; Vice-Chancellor *Knight Bruce* having been of opinion, that the Defendant was protected by the position in which he stood, being a purchaser for valuable consideration without notice. The late wife of the Plaintiff, under the will of her uncle, was entitled to a legacy of 2000*l.*, which was not to be payable, or need not be paid, during the lifetime of the uncle's widow. The first bill proceeded upon this ground, viz., that the niece being entitled to this legacy, the payment whereof, however, was to be postponed during the lifetime of the widow, she released her title to it: that the widow made her will, giving the niece a portion of the real estates which she had derived from the testator; and that so the matter stood, until the period when the widow married the Defendant: and the claim to the legacy of 2000*l.* was the substance of the original bill. Then a supplemental bill was filed, which does not appear to me to be at all contrary to the practice of the Court, or inconsistent with the case made by the original bill. That it introduced a new case is perfectly true; it set forth the original bill, and stated the contract of settlement made at a subsequent period, of which certain evidence is offered, and under which the Plaintiff was entitled by virtue of the contract to claim, and to have conveyed to him, part of the estates the subject thereof. The Defendant says, "I married the widow, who, under the will of her former husband, is entitled to an absolute interest in the estate; and I had no notice whatever of the Plaintiff's claim as to the legacy of 2000*l.*; therefore, it is released; and as to the claim to the estate under the will, I was a purchaser for valuable consideration, and, therefore, I am not liable

to make good whatever may have been contained in that contract."

Now, upon the subject of the purchase for valuable consideration without notice, there are two points on which it is met. There are two passages—one in each of the answers—one in the answer to the original bill, and the other in the answer to the supplemental bill, which touch on that question, independently of which there is stated the fact that the Plaintiff was in possession of the estate, and, being so, the Defendant *John Watts* was bound to inquire, and must be taken to have known, the title under which that possession was claimed; and that, therefore, though the Plaintiff was a sort of tenant during that period, yet that the benefit of the contract made by the wife enured to him; and that, under those circumstances, the party setting up the title of purchaser without notice was bound to make all proper inquiries, and had constructive notice of what the Plaintiff's interest was. That question, as it appears to me, is hardly to be discussed, because, although on the answer the Defendant does not admit the knowledge of the notice to him of the agreement, as such, yet certainly there is enough to shew that the party having notice, so far as he admits he had notice, was bound to pursue the inquiry, and had constructive notice, in that sense, of the whole of the facts stated, if those facts be true. Now, in the first answer, the Defendant's late wife says—[Here his Lordship read the passage from the answer to the first bill, already stated.] Well, then, that certainly is short of an admission of there being a contract to leave the *Broadward Hall* estate; but there are these two facts put together, viz., that the legatee released her legacy, and that, in lieu thereof, there had been a devise of the estate in question. Now, in the subsequent answer of the Defendant *John Watts* we have it thus stated:—[Here his Lordship read the passage already set forth, p. 273, beginning with the words "Says, that, previously."] The Defendant

1849.
 PENNY
 v.
 WATTS.
 —
Judgment.

1849.
 PENNY
 v.
 WATTS.
 —
Judgment.

therefore admits, that, previously to his marriage, he had notice that the Plaintiff's late wife had given up her legacy, and that, in lieu thereof, *Rebecca Watts* devised to her the estate. Now these two facts coming to the knowledge of the Defendant,—one party giving up a valuable pecuniary consideration, and the other, in lieu thereof, devising a certain estate,—I think it is not carrying the doctrine of this Court further than it has often been carried, to say, that, knowing these facts, you were bound to inquire how they took place; and that, as you knew that the one party gave up the legacy, and as you knew also, that, in lieu thereof, the other party had devised the estate, you cannot afterwards (if the fact be proved) say, that you had not that sort of knowledge which would affect you with constructive notice of that which, if the facts be proved to exist, would shew that the Plaintiff had an equitable title by contract to have the estate so devised to his late wife. There is the case of *Taylor v. Baker* (a), which certainly embraces the whole of that proposition. In that case, A. made an equitable mortgage to B., and on giving a second security to C., told him that he had given a judgment or warrant of attorney—not a security, not a mortgage, but a judgment or warrant of attorney for money borrowed; and it was held, that, having such information, viz., that a judgment or warrant of attorney had been given, he was bound to pursue the inquiry further; and if he had, it then would have turned out, as the fact was, that there was an actual security given on the land. That was a notice leading the party to further investigation, and, being in that position, he could not set up the fact of his being purchaser without notice. If, therefore, the facts are in this case as stated by the Plaintiff, I cannot think this is a case in which the Defendant is entitled to protect himself as a purchaser for valuable consideration without notice. The facts are, however, in a state of the most extraordinary obscurity.

(a) 5 Price, 306.

1849.

PENNY

v.

WATTS.

Judgment.

First of all, we have, as evidence of the release of the 2000*l.*, a most suspicious piece of evidence produced, namely, a document which appears to me to be a fragment of a deed, containing just enough to shew the release, but shewing nothing of any other part of the deed. How it came to be in that state does not appear; but that the account of the finding of it is not correct, is quite certain. It is introduced, however, as a fragment, and has the signature of the party, and has enough to prove that it was a release of the legacy of 2000*l.*; but for what consideration, and under what circumstances, or for what purpose it was executed, (the rest of the document being absent,) we have no means of ascertaining from the document itself. Then, again, on the part of the Plaintiff, there is a very extraordinary story of a subsequent instrument having been prepared and executed, and then destroyed by Mrs. *Watts*. That it should have been prepared and executed would fall in very much with other parts of the case; but that it should be destroyed, and that by Mrs. *Watts*, and in the presence of the attorney who prepared it, without, apparently, any interposition on his part, is a matter, no doubt, very much requiring explanation. And yet these are the two facts on which the Plaintiff's title (if the Defendant is not entitled to protect himself as a purchaser without notice), must depend. The Defendant says, you have released your 2000*l.*, and then the Plaintiff says, that 2000*l.*, if not my due now, has been given up conditionally as the price of a binding contract on Mrs. *Watts*, the then owner of the estate, to devise a certain part of the estate called the *Broadward Hall* estate; and that title depends on the existence of this instrument not produced, the history of which is deposed to, and is said to have been executed, having afterwards been destroyed. Now, I am not in a situation to dispose of the case on these facts; and, being of opinion that the Defendant cannot protect himself as a purchaser for valuable consideration without notice, I

1849.

PENNY

v.

WATTS.

Judgment.

must have these facts investigated before a jury, ere I can exercise the jurisdiction between the parties, upon the facts on which their title depends.

What I propose, therefore, is to direct three issues; and the first issue—subject, however, to any observation that counsel may make—will be, whether, at the time of the death of Mrs. *Watts*, the legacy of 2000*l.* had been effectually released: that is the first thing to be ascertained. Secondly, if it turn out that it was effectually released, then, whether such release was in consideration of the *Broadward Hall* estate being devised to Mrs. *Penny* or her heirs; and then, thirdly, whether the agreement of the 29th September, 1835, (which is the agreement that was afterwards destroyed,) was executed by Mrs. *Watts*. It is quite clear, if she executed that agreement, no authority was given to destroy it: however, the statement is, that she destroyed it herself. If she executed it, it would be a binding agreement on those who claim through her. It appears to me that those three issues will bring out all the facts on which the title of the parties depends, on the supposition that the Defendant is entitled to any equity to which his wife was entitled. Therefore, unless anything is suggested as to the form of the issues, the decree will be to the effect I have stated.

1849.

re DAVID OCHTERLONY DYCE SOMBRE, a
Lunatic.

*Feb. 24th &
28th.*

*March 2nd,
3rd, & 7th.*

April 10th.

THE Petitioner, *David Ochterlony Dyce Sombre*, under a
commission of lunacy issued on the 28th of July, 1843,
found to be of unsound mind, so as not to be sufficient
to the government of himself and his property, and to
have been in such state of mind from the 24th of October,

On the 8th of February, 1844, the Honourable
Ann Dyce Sombre, the Petitioner's wife, and *T. H.*
er, were appointed the committees of the person, and
Larking the committee of the Petitioner's estate.

On the 21st of July, 1846, an order was made, on the
petition of Mr. *Dyce Sombre*, that the Petitioner should be
at liberty to attend at *Dover*, to be examined by Dr.
hey and Dr. *Bright* as to the state of his mind; and

during his stay at *Dover*, his liberty should not be
interfered with. Those physicians made a report of their
examination, dated the 26th of September, 1846, stating
in their opinion that the Petitioner was still of unsound mind;

on that petition being again brought on before the
Lord Chancellor, on the 18th of January, 1847, his Lord-
ship declined to make any further order thereon. On the

1st of July, 1847, another order was made by the *Lord*
Chancellor, on the application of Mr. *Dyce Sombre*, that the
Petitioner should be at liberty to attend at *Brighton*, for
the purpose of being examined by the same physicians, as
to his then state of mind, and his ability to manage him-
self, his property, and affairs; and their report, dated the

In some cases,
lunatics may
be supposed to
be entitled to
the same kind
of indulgence
which the
Court exer-
cises in favour
of infants, in
disregarding
matters of
form, when ne-
cessary, in or-
der the better
to protect their
interests; but
a party apply-
ing for the
supersedeas of
a commission
under which
he has been
found of un-
sound mind,
cannot be con-
sidered entitled
to such a privi-
lege.

The *Lord*
Chancellor, un-
der the parti-
cular circum-
stances appear-
ing before him,
being of opin-
ion that a peti-
tion which had
been present-
ed, in the name
of a lunatic, to
supersede his
commission,
was not got up
by the Peti-

and his solicitors, but by a third person, who had previously entered into an agree-
ment to be paid a sum of money by the lunatic, in case he succeeded in superseding the com-
mission, and whose conduct in other respects the *Lord Chancellor* highly disapproved, dis-
missed the petition.

The light in which the Court regards private communications to a Judge, for the purpose of
influencing his decision on a matter publicly before him.

1849.

In re
DYCE SOMBRE.

Statement.

5th of August, 1847, was to the effect that they could not come to the conclusion that the Petitioner was then perfectly sane, but that, so far as respected the management of property, they entertained no doubt of the Petitioner's competency to take care of it; and they thought, that if the Petitioner were intrusted with the surplus of his unappropriated income, one great cause of uneasiness to him would be removed; and they were also of opinion, that the tranquillising influence of foreign travel, on which the Petitioner's mind seemed then bent, might operate on his health. On the 8th of September, 1847, the *Lord Chancellor*, on the application of the Petitioner, ordered, (amongst other things), that the whole of the clear available income to arise from the Petitioner's estate, after defraying all costs, charges, and other outgoings, including an allowance of 4000*l.* per annum to the wife of the Petitioner, should be allowed and paid to the Petitioner for his maintenance and support, from time to time, until further order. On the 9th of August, 1848, another order was made by the *Lord Chancellor*, on the petition of Mr. *Dyce Sombre*, (being the fourth in order of the petitions presented by him,) whereby it was ordered that the Petitioner should be at liberty to attend in *London*, for the purpose of being examined by the following medical gentlemen, viz, Dr. *Bright* and Dr. *Southey*, as the nominees of the Great Seal, Sir *J. Clark*, the nominee of Mrs. *Dyce Sombre*, and Mr. *Martin*, the nominee of the Petitioner, as to the Petitioner's state of mind, and his competency to the management of himself, his property, and affairs; and, in pursuance of that order, the Petitioner was examined during three several days, in the month of November, 1848, by those gentlemen, who, by their report, dated the 18th of that month, stated, that, from the whole tenor of the Petitioner's conversation and manner, they regretted to find that no improvement appeared to have taken place since the Petitioner was last in *England*; on the contrary, Drs.

Bright and *Southey* thought that the Petitioner was more obviously unsound in mind than when they last examined him; and all of them were of opinion that the Petitioner was quite unfit to be intrusted with the management of his own affairs. The last-mentioned petition having, on the 22nd of December, 1848, been again brought on, and the Petitioner's counsel having stated, that, after perusing the report of the 18th of November last, he could not, on that petition, ask for a *supersedeas* of the commission, no other order was made thereon, except that the petition should stand over as to costs. Between the 18th of November and the 22nd of December, 1848, the Petitioner had submitted himself to the examination of six physicians of celebrity, resident in or in the immediate vicinity of *London*, who repeatedly saw, and had interviews with, and examined the Petitioner, for the purpose of informing themselves of the soundness or unsoundness of the Petitioner's mind, and who had in their possession, during the whole period of such examination, the several reports of the four physicians already mentioned, and, in particular, the report of the 18th of November, 1848, and the entire evidence, taken in short-hand, upon which that report was made, but not the judgment of Lord *Lyndhurst*, on the first petition presented by Mr. *Dyce Sombre*; and the result of such interviews and examination was a statement in writing, signed by the six physicians, to the effect that the impression on their minds was, that the Petitioner did not labour under any unsoundness of mind; that the existing commission ought to be superseded; and that the pressures and annoyances to which the Petitioner was then subjected, by reason of the commission, might, if persisted in, lead ultimately to mental aberrations and bodily infirmity. The present petition, which was the fifth that had been presented by Mr. *Dyce Sombre* to the *Lord Chancellor*, after stating to the effect already appearing, and that the Petitioner was then residing at *Paris*, and was desirous,

1849.

In re
DYCE SOMBRE.

Statement.

1849.

In re

DYCE SOMER.

Statement.

at such times as might be agreeable and convenient to himself, of residing in *London*, or other places in *England* free from any danger of interference with the liberty of his person by the committees thereof, prayed that the commission might be ordered to be superseded, or that the petition, so far as it prayed the *supersedeas* of the commission, might be ordered to stand over; and that, in the meantime, the Petitioner might be at liberty to reside in *London*, or elsewhere in *England*, free from any danger of interference with the liberty of his person by the committees; and that such committees might be discharged; and that the Petitioner might be allowed to attend on all inquiries, and on the taking of all accounts before the Master, concerning the management and care of the Petitioner's estate.

In the course of the arguments many letters and other documents were read besides those referred to by the *Lord Chancellor* in his judgment, which, on account of the grounds on which his Lordship's judgment proceeded, are not here stated.

Argument.

Mr. Rolt, Mr. Roundell Palmer, and Mr. Shadwell, in support of the petition, argued, that the case now came before his Lordship under circumstances widely different from those under which all the former applications had been made on behalf of the Petitioner; that, on the present occasion, there was—in contrast with the opinions of the four medical gentlemen who had last reported to his Lordship on the case—the opinions of six medical gentlemen of at least equal eminence.

[The LORD CHANCELLOR.—It is true we have now a statement from other physicians, no doubt as eminent as those who reported against the *supersedeas*, but without

a knowledge of the history of the lunacy, or their attention directed to the points on which the lunatic's mind is affected; but, as I decided before on the evidence of medical gentlemen fully acquainted with the case, it is impossible that I should take on myself to decide contrary to that evidence, without further inquiry.]

1849.

In re
DYCE SOMBRE.

Argument.

But the *six* medical gentlemen had not only the reports of the former medical gentlemen, issued in 1846 and 1847, but the short-hand notes of everything that transpired between the Petitioner and his four medical examiners in 1848, and also their report of the 18th of November, 1848; that it was to be considered whether any singularity of mind exhibited by the Petitioner were mere errors of opinion or delusions of mind; that, if they were the former only, his Lordship would at once supersede the commission; if the latter, then the question arose, whether the delusions were such as amounted to unsoundness of mind; and, even if so, the further question would arise, whether his Lordship, in the present case, could come to the conclusion that the Petitioner was of unsound mind, so as to be incapable of managing himself, his property, and affairs; that, even if his Lordship should be of opinion the Petitioner was of unsound mind, still, according to the evidence adduced, the Petitioner was not so unsound in mind as to be incapable of managing his affairs; that the peculiarity of the present case was, that it was one of retreating insanity, and required to be considered differently to those brought forward for the first time; that the Petitioner was a native of *India*, brought up and educated in Asiatic habits, the son of Colonel *Dyce* and of a female who was an inmate of the Zenana of the *Begum Soomroo*; that the extraordinary jealousy exhibited by the Petitioner towards his wife was not to be wondered at, inasmuch as the chastity of their females was, with Asiatics, the great point of honour; that the Petitioner's suspicions of his wife's

1849.

In re
DYCE SOMBRE.

Argument.

fidelity were the key to his insanity, and it would be found that all his delusions had reference, more or less, to that. [Here counsel referred at length to the evidence in the case generally, and read a letter written by Sir *Charles Trevelyan*, (who had been in the political service of the East India Company in *India*,) to the East India Company, in August, 1843, and who was well acquainted with the Petitioner and his family, and his habits of life, but which, considering the ground on which his Lordship decided the case, it is unnecessary to particularise.] It was further argued, on behalf of the Petitioner, that the report of the four medical gentlemen, of the 18th of November, 1848, was not only inconclusive, but contrary to the evidence on which it professed to be founded; that there was no benefit to result from the continuance of the commission, nor was there any waste by the Petitioner of his funds, but on the contrary, there had been a niggardliness in money matters on the part of the Petitioner, approaching to meanness; and that his Lordship would, as an alternative, not object to allow the Petitioner an interview, or to submit his case to the opinion of another jury, or, at all events, revoke the appointment of the committees of the person, which prevented the Petitioner returning to this country.

Mr. *Bethell*, Mr. *Calvert*, and Mr. *Giffard*, for the committees of the person, argued, that the application had been pressed forward by interested parties, and (amongst others), by one *Anthony M.*, otherwise Dr. *M.*, whose name very frequently appeared in the evidence adduced on the petition; that the petition might be properly considered the petition of Dr. *M.*, and not of Mr. *Dyce Sombre*, from whom large sums of money had been already obtained by Dr. *M.*; that his Lordship would be quite justified in devising some mode of preventing the trafficking in the weakness of the Petitioner, of the existence of which, the documents and evidence adduced in opposition to the present

application, left no doubt in the mind of any reasonable person; that Messrs. *S.*, who prepared the present petition, acted as the solicitors of Dr. *M.*, some time back, in an appeal to the House of Lords, involving circumstances of a very delicate nature, and had ever since acted as such, and it was entirely through the intervention of Dr. *M.* that Messrs. *S.* were employed in the present case; that the letter of the 18th of January, 1849, addressed to his Lordship by three noblemen and other gentlemen, stating their belief in Mr. *Dyce Sombre's* sanity, was a contempt of Court, and an insult to his Lordship, and deserving of the severest reprehension; that the six medical gentlemen who had made a statement in favour of Mr. *Dyce Sombre's* sanity had not had the same opportunities of investigating the state of his mind as the other medical gentlemen had, who reported thereon at different times; that, in order to determine on the propriety of superseding a commission of lunacy, it was necessary to be made acquainted with the daily habits of life of the subject of it; and that the evidence adduced in support of the present application was of a most unsatisfactory character, and would not bear contrasting with the evidence opposed to it, especially when regard was had to the circumstances attending the latter. [*Attorney-General v. Parnther* (a), and *Waring v. Waring* (b), were referred to in opposition to the petition.]

1849.
In re
DYCE SOMBRE.
Argument.

Mr. *James Parker* and Mr. *E. F. Moore* appeared for Mrs. *Troup* and Madame *Solaroli*, the sisters and next of kin of the Petitioner, and strenuously resisted the imputation of Madame *Solaroli's* illegitimacy.

Mr. *Lloyd* and Mr. *Morris*, for the committee of the estate, took no part in the argument.

Mr. *Rolt*, in reply, insisted that the case did not in any

(a) 3 Bro. C. C. 441.

(b) 12 Jur. 947.

1849.

In re
DYCE SOMERRE.

Argument.

degree depend on the conduct of Dr. *M.*, or the evidence of the noblemen and other gentlemen referred to in the course of the argument, or of the other proceedings of the present solicitors of the Petitioner; that the present petition was only supplemental to that of 1848; and that there did not exist in the Petitioner an unsoundness of mind and an incapacity to manage himself, his property, and affairs. [The case of *Ex parte Holyland* (a), and the works of Dr. *Pritchard* on Insanity (b), as also of Dr. *Conolly* on the same subject, were referred to in the reply.]

April 10th.

Judgment.

The LORD CHANCELLOR:—

The circumstances under which this case comes before me might have raised much difficulty as to the course I ought to pursue. I owe a most important duty towards the person in whose name the petition is presented; but I also owe a duty towards the Court over which I preside, in which all those who are under the necessity of resorting to it are interested. In the case of infants, it is the habit of the Court very much to disregard form, when necessary, in order the better to protect their interests: and, in some respects, lunatics may be supposed to be entitled to a similar privilege; but a party who applies for a *supersedeas* of a commission can hardly be considered as entitled to such indulgence. He comes here asserting that he is of sound mind, and he cannot, at the same time, claim the benefit of any relaxation of the practice, conceded to those who are of unsound mind. This distinction ought not to be carried too far; but the history of this petition will, I think, demonstrate that it would be most injurious to the interests of the class of unfortunate persons who are under the protection of the Court, to disregard it altogether.

(a) 11 Ves. 10.

(b) Page 65, edit. 1842.

This is the fifth petition for a *supersedeas* which has been presented since the commission issued in 1843, under which the Petitioner was found to be of unsound mind. The fourth petition was presented in June, 1848, and was supported by an affidavit (among others) of three physicians in *Paris*, by which they certified they had examined the state of Mr. *Dyce Sombre's* mind, and that they considered him fully competent to the management of himself and his property. There were also affidavits of many persons of station, both French and English, who spoke to the general propriety of his conduct at *Paris*, and stated that they believed him to be in the full possession and enjoyment of his intellectual faculties. The petition so supported, prayed that the commission might be superseded, and, in order thereto, that he might be examined, if I should think it necessary, by such physicians as I might appoint, touching the state of his mind. The course of my duty was very clear; and, by an order of the 9th of August, 1848, I directed that the Petitioner should attend in *London*, and be examined by Drs. *Bright* and *Southey*, who had examined him before, and who are the physicians usually consulted by the Great Seal on such occasions, and also by Sir *James Clark*, who was named by the committees of the person, and also by Mr. *Martin*, who was named by the Petitioner himself. All of those four gentlemen had opportunities of being acquainted with the character of his malady, and were particularly qualified, therefore, to form a correct opinion as to whether it had ceased or continued in any degree. All the evidence which had been up to that time adduced, was, as a matter of course, laid before those four gentlemen; but no application was made for any special direction as to the manner in which the examination was to be conducted, or as to laying any new evidence before them, or supplying any supposed omission by other affidavits. The conclusion of the report made to me by those four gentlemen, signed by them all, and dated the

1849.

In re
DYCE SOMBRE.

Judgment.

1849.

In re
DYCE SOMBRE.

Judgment.

18th of November, 1848, was—[Here his Lordship's conclusion of the report, already stated.]

The short-hand writer's notes of what passed at amination were taken and referred to in the report of the physicians; the petition coming on again, on the 22nd of December, 1848, the counsel for the Petitioner stated, he could not, on that report, ask for a *supersedeas* and thereupon the application for that purpose was refused, though no order appears to have been drawn up; and on a question being raised as to the costs, the Respondent contending, that the dismissal, with costs, was necessary in order to protect them against a repetition of such attempts, I declined making any order at that time, the costs, and directed the petition to stand over on that day, thinking that the pendency of the question of costs would afford a sufficient security against any unnecessary repetition of such applications, and that a sufficient case to support it.

Nothing was then said or attempted by way of disputing the correctness of the report so made. There was no position for adducing additional evidence, or for any investigation or inquiry; and it appeared that the matter was set at rest for the present, unless some new circumstances should arise to vary the case made on behalf of the Petitioner.

Not long after this I received two communications of a character unexampled, I hope, in the history of this Court. The first was dated the 24th of December, 1848, and was after Mr. *Dyce Sombre's* petition for a *supersedeas* had been refused, with the concurrence of his professional advisers, and was signed by six physicians: the other was dated the 18th of January, 1849, and signed by three noblemen and four other gentlemen; to which was added a note,

by a gentleman connected with the Treasury. This latter document appears to have been intended principally to introduce the former. There are, however, parts of it on which I shall presently make some observations. The whole of this proceeding was most irregular and improper. Every private communication to a Judge, for the purpose of influencing his decision on a matter publicly before him, always is and ought to be reprobated. It is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought, perhaps, more frequently than it is, to be treated, as it really is, a high contempt of the Court. It is too often excused on account of the station in life of the parties, and their supposed ignorance of what is due to a Court of Justice: but no such excuse can be made in the present instance. If this was not intended as a private communication, why was it made in that form? Why not have brought it before the Court in the usual manner, through the solicitor and the counsel of the party, who alone can be recognised by the Court as representing him?

1849.

In re
DYCE SOMBRE.

Judgment.

Having said so much on the subject of this communication as a contempt of Court, I have to consider how it ought to influence my conduct on the matter of the fifth petition for a *supersedeas*, which has since been presented. I do not find any statement as to the time at which Mr. *Dyce Sombre* left this country after the examination of November, 1848; but, as, by my order, the protection was to continue until the report of the physicians was made, and as the report is dated the 18th November, 1848, I must assume he left this country soon after that time; and I cannot suppose him to have been in this country after the 22nd of December, when my order dismissing the former petition was made. This is of some importance in the consideration how far I am to consider the petition presented on the 29th of January, 1849, as the act of Mr. *Dyce Sombre*, whose former petition for the same purpose was,

1849.
 In re
 DYCE SOMBRE.
 Judgment.

with his own concurrence, expressed through his counsel, dismissed on the 22nd of December. On this subject most important evidence is contained in a letter from Mr. *Dyce Sombre* to myself, dated *Paris*, 12th of January, 1849, and its several inclosures, one of which, No. 3, is a letter purporting to be signed by *A. M.*, called in other places Dr. *M.*, and addressed to Colonel *Dyce Sombre*, which recites an agreement between him and Mr. *Dyce Sombre*, a lunatic under a commission, under which Mr. *Dyce Sombre* is represented as agreeing to pay this Dr. *M.* 10,000*l.*, in case the commission of lunacy should be superseded through his instrumentality and exertions, or Mr. *Dyce Sombre* should be placed in the uncontrolled possession of his property, and the proceedings annulled before or about the 31st of December, 1845; and which paper also stated, pursuant to this letter, a contract bearing date in July, 1845, and a power of attorney of the 25th of August, 1845, whereby Colonel *Dyce Sombre* appointed Dr. *M.* his agent, and gave him full power and authority to act on his behalf. This agreement appears to have remained in force until April, 1848; the petition, therefore, in January, 1846, and that of July, 1847, must be referred to this agreement; but, both having failed, it is obvious that, according to its very terms, all title to the 10,000*l.*, or any part of it, had also failed; but by the same inclosure, I find another paper, purporting to be signed by *A. M.*, which is as follows:—
 “In consequence of Colonel *Dyce Sombre* having, in April, 1848, put an end to the agreement of July, 1845, whereby Dr. *M.* was entitled to claim 10,000*l.* as a compensation for his services, risks, responsibilities, and expenses, on the *supersedeas* of the commission of lunacy against Colonel *Dyce Sombre*, Dr. *M.* proposes to the arbitrators to estimate the compensation that he is entitled to for his services from July, 1845, to April, 1848, in either of the manners following, viz:—First, what proportion of the 10,000*l.* is Dr. *M.* entitled to for the increase of income,

re-opening the commission, and the standing obtained the Court of Chancery, whereby Colonel *Dyce Sombre* within a short period supersede the commission? Is Dr. *M.* done one-third, one-half, or three-fourths of the work? Secondly, what per annum for three years are the entire services of a physician or surgeon of twenty years' standing worth, who devotes himself solely to conduct and manage a suit in Chancery, upon which 500,000*l.* depends"—here comes the most important part of this document—"to manage, conduct, and obtain the favourable report of medical men of the first eminence in favour of the party entitled to the 500,000*l.*, against whom a commission of lunacy is in force,—who has succeeded in obtaining a *locus standi* in the Court of Chancery, to supersede the commission, and who has succeeded in augmenting Colonel *Dyce Sombre's* income from 60*l.* a week to the entire surplus of his income, after deducting 4000*l.* per annum paid to Mrs. *Dyce Sombre*?" By another paper, reporting to be a copy of an award, signed *H. D. Princep* and *W. H. Richardson*, 640*l.* 7*s.* 6*d.* is awarded to this Dr. *M.*, for monies paid and expenses incurred in bringing the petition before me, and 1500*l.* for services, losses, and liabilities incurred by this Dr. *M.*, making together 40*l.* 7*s.* 6*d.*, the 640*l.* 7*s.* 6*d.* to be paid immediately, the 1500*l.* to be paid in notes at various terms, the last eighteen months after date.

Mr. *Dyce Sombre*, in his letter to me of the 12th of January last, complains of this, and well he may; for Dr. *M.*, who was to receive 10,000*l.* if he succeeded, and in that event only, has obtained 2140*l.* on failure. Language adapted to the ordinary circumstances of life would be found wanting in an attempt to express the opinion of any honest mind as to such a transaction as this. While plunging Mr. *Dyce Sombre* in a manner, and by means which could not be practised against any one of sound mind, Dr.

1849.

In re

DYCE SOMBRE.

Judgment.

1849.

In re

DYCE SOMBRE.

Judgment.

M. represents him as competent to manage his own affairs, but thinks 10,000*l.* not too large a sum for the service of inducing me to adopt that opinion; part of which is to be expended in managing, conducting, and obtaining the favourable reports of medical men of the first eminence as to the sanity of Mr. *Dyce Sombre*. Unfortunately for Mr. *Dyce Sombre*, notwithstanding his expression of dissatisfaction, it appears that he is again in the hands of Dr. *M.*, but whether under the old or under some new agreement, does not appear. I strongly suspect, however, that he is as much the author of this petition of January, 1849, as he was of the former, and that Mr. *Dyce Sombre* knew nothing of it for some time after the preparations had been made for its presentation.

I have stated, it did not appear at what time Mr. *Dyce Sombre* left *England*; if he left it soon after the report of the 18th of November, he could not have been a party to the proceeding I am about to advert to; and if he was in *England*, it is clear the actors in these proceedings did not think it necessary to consult or communicate with him on the subject, although the object was to have it believed that he was a person of sound mind, and capable of managing his own affairs. Finding, then, that this petition, though not presented till the 29th of January, 1849, must have been contemplated early in December, and on the 22nd of that month a former petition for the same purpose was, with the concurrence of the solicitor and the counsel for the Petitioner, dismissed, and the Petitioner and his legal advisers were not parties to the getting up of this case, but that it appears to have been got up and managed by Dr. *M.*, who, on a former occasion, had induced the lunatic to promise to give him 10,000*l.* if he succeeded in superseding the commission, by managing, conducting, and obtaining the favourable report of medical men of the first eminence, and who, having failed, obtained from him 2140*l.*, and that

1849.

In re
DYCE SOMBRE.

Judgment.

the first step taken for effecting that purpose, in the expectation that it might have some weight with me, was to send me privately a letter, signed by several noblemen and gentlemen, and a certificate, signed by six physicians of known and well merited celebrity, I do not think I should be doing my duty to the jurisdiction I am exercising, and to the interests of the many unfortunate persons who are subject to it, if I should, on such a proceeding, give effect to any favourable opinion I might have formed on the real merits of the case. I am not, however, under the necessity of coming to any conclusion on that point; for if this proceeding had not been open to the many objections I have alluded to, I should still be of opinion, that, on the weight of evidence, I ought not to supersede the commission. [His Lordship here entered into the details and circumstances of the case.]

I must dismiss this petition; and, if I had the means of making those pay the costs of it from whom it originated, I should dismiss it, with costs: but as the matter stands, I cannot say anything about the costs.

But I must give one piece of advice to Mr. *Dyce Sombre* before I conclude:—He must not, in the first place, suppose that the door of the Court is shut against him, because this petition is dismissed. Any application which he may make himself, will be carefully attended to; and, as soon as it can safely be done, the commission will be superseded. The only operation of it at present is, to protect the capital of his property, the whole surplus income being ordered to be paid to him; and if there be any irregularity in such payment, or anything improper in the management of his property, any applications to remedy the evil will be attended to. But I am sorry to say, that these discussions have brought out instances of such reckless expenditure of his income,

1849.

In re

DYCE SOMBRE.

Judgment.

that it may be a matter for consideration, whether I have not gone too far in ordering the whole of his surplus income to be paid to him. When I find a contract to pay 10,000*l.* to Dr. *M.*, dependent on the success of the *superseas*, and above 2000*l.* paid upon failure, and when I find offers of bribes to judges, physicians, and others, which can only be excused on the plea of insanity,—being, on any other supposition, attempts to corrupt, and possibly at the same time to deceive,—I cannot but doubt whether I ought not to establish a more vigilant superintendence over the expenditure of his income. I should be very unwilling to do so; and I trust I shall not find any reason hereafter for so doing.

Above all, I would advise Mr. *Dyce Sombre* to act under the direction of his professional advisers; no man can possibly be in better hands, and no others can more effectually serve him, than those who now act for him professionally. If he confides in such men, he will be sure to obtain all which, under the circumstances, it will be possible for him to obtain; all, in short, that is consistent with his own interest, and that at an expense far less than he will incur if he continues the ruinous system in which he appears to have been involved.

MOSLEY v. BAKER.

1849.

1848.

Dec. 11th.

1849.

Jan. 30th.

THIS cause came before the *Lord Chancellor*, by way of appeal from the decision of Vice-Chancellor *Wigram*. The particulars are fully reported in 6 Hare, 87. The suit was instituted to establish the right of the Plaintiff to redeem some property, which had been mortgaged by him to a building society called The Equitable Provident Association and Savings Fund; and the question turned upon the construction of the mortgage-deed, and of the rules of the Society.

By the rules of the Association, each member was to pay 10s. a month on every share which he held, and those payments were to be continued until the funds were sufficient to pay to each member 120l., when the Association was to terminate. Whenever the funds amounted to an adequate sum, the Association advanced it to one of the members, upon landed security of sufficient value. The subject was to be brought forward at a general meeting, and the money was to be advanced to the member, who, at a kind of auction, consented to receive the smallest amount as the present value of one share; and, upon receiving the advance, he was thenceforth to pay an additional sum of 4s. a month for each share, which was called redemption-money.

The form of the mortgage-deed was provided for by the 58th rule of the Association.

In 1845 the Plaintiff purchased twelve shares and a-half

A member of a building society purchased shares, in respect of which a sum of money was advanced to him, and he executed a conveyance to the trustees of the society, to secure the payment and observance by him of all subscriptions, fines, and regulations of the society; and, in default, the trustees were to sell, and retain out of the proceeds, all such subscriptions and other payments as should be then due, and should thereafter become due, in respect of those shares, calculating the probable duration of the society; and it was agreed, that all monies which should thereafter become due, should be considered as due at the time of the sale. By the rules of the

society, a purchasing member was entitled to redeem, upon payment of the difference between the amount secured by the mortgage, and the amount of his subscriptions and his share of the profits. No profits had been made in this case:—*Held*, that the Plaintiff was not entitled to redeem, upon payment of the difference between the sum advanced and the amount paid by him for subscriptions, &c.; but only upon payment of all subscriptions which would become payable during the probable duration of the society; and that those future subscriptions were to be paid in full at the time of redemption.

1849.
 ———
 MOSLEY
 v.
 BAKER.
 ———
Statement.

in the Association, in respect of which they advanced him 750*l.* (being at the rate of 60*l.* per share) on the security of the mortgaged tenements. By the mortgage-deed, the trustees of the Association were to hold the mortgaged property in trust, to allow the Plaintiff to hold and enjoy the same, if he should from time to time pay, observe, and perform all the subscriptions, payments, redemption-money, and regulations, according to the articles of the Association. But in case of his default, then the trustees were to appoint a receiver of the rents, and thereout pay, satisfy, and effect all the said purposes; and if the rents should not be sufficient, then the trustees were to sell, and, after payment of the expenses of the trust, they were to retain all such subscriptions and other payments as should be then, *and should thereafter become* (a) due, and owing, and payable, in respect of the Plaintiff's shares, calculating the probable duration of the Association, (it being thereby agreed, that, in case of such sale, all monies which should at any time afterwards become due in respect of the shares should be considered as due at the time of such sale); and the surplus, if any, was to be paid to the Plaintiff. This mortgage was dated in April, 1845. It contained no covenant to repay the principal sum advanced, nor any proviso for redemption.

The Plaintiff made default in payment of the monthly subscriptions, and the trustees thereupon exercised their power of sale as to part of the property. In April, 1847, the Plaintiff proposed to redeem, and calculated the amount of the debt which was still due from him, as if the transaction had been a common mortgage. He took the amount of the original advance (750*l.*), and the sums which had since become payable from him to the Association, as forming the debt, and deducted from it the sums which

(a) These words were not in the 58th rule.

the Association had received from him for subscriptions, and tendered the balance. The Association, on the other hand, insisted that the sum to be paid by him was the amount of his future subscriptions and payments, according to the probable duration of the Association, and that they ought to be calculated at their full amount, as now due, and not at the present value of future payments.

1849.
 Mosley
 v.
 Baker.
 —
Statement.

The Plaintiff then instituted this suit to redeem; praying for an account, and for a declaration that, in taking such account, he ought not to be charged with any sums for redemption-money, subscriptions, fines, or other payments on the said shares, accruing after the tender.

It was admitted that there were no profits; and, consequently, no question was raised as to the Plaintiff's right to participate in them.

The 62nd rule was as follows:—"That, if any member of this Association shall be desirous of paying off and redeeming any security or securities which he or she shall have given to this Association, and shall give notice of such his or her desire to the manager, the directors shall allow such member the profits of his share or shares made up to such time, and shall make a deduction of such profits, and of the amount of subscriptions paid in by such member, from the full amount expressed to be secured in and by the mortgage; and the directors are hereby authorised and empowered to receive the balance, either in one payment or by such instalments as the directors and the member shall agree upon; and on payment of the balance, together with all fines due in respect of such share or shares, the directors shall authorise the trustees to deliver all deeds and other documents in their custody, relating to the mortgage so redeemed, to the member, and at his or her cost indorse a receipt or acknowledgment of payment on such mortgage, according to 6 & 7 Will. IV, c. 32."

1849.
 ———
 MOSLEY
 v.
 BAKER.
 ———
Statement.

The Vice-Chancellor *Wigram* decided that the Plaintiff was only entitled to redeem upon the terms of paying up his future subscriptions, calculated until the probable time of the termination of the Association; and the Plaintiff appealed from that decision.

Argument.

Mr. *Rolt* and Mr. *Prior*, for the Appellant:—

The 9 & 10 Vict. c. 27, s. 2, allows any member of a society which is within that Act, to withdraw on payment of all arrears, where the rules of the particular society do not prescribe conditions of withdrawal. This Association has a rule (65th) for the withdrawal of non-purchasing members only. Therefore, the Plaintiff here may withdraw from it under the Act, on payment of all arrears due from him when he withdraws. The terms of the mortgage-deed, which refer to future subscriptions, are not warranted by the rules. The right of redemption is meant to be an advantage and a privilege; but this decree compels a party who redeems, to pay, in ready money, the amount of subscriptions, some of which will not be due for ten years. The Plaintiff is entitled to redeem on the terms of the 62nd rule, upon paying the difference between the amount of the loan and the amount of the subscriptions paid by him.

The *Solicitor-General* and Mr. *Beavan*, for the Association:—

The question is, what was secured by the deed, which has been inaccurately termed a mortgage-deed? It was not the sum of 750*l.*; and there was not any loan, or advance of money in the nature of a loan. But the purchasing member received, at the time of his purchase, the amount which was the then value of the sum which it was calculated the shares would produce at the termination of

the Association; and when he received it, he gave security that his subscriptions and fines should be duly paid. After he had actually received the money, and thus anticipated his share, it was impossible that he could withdraw from the Association, without paying all his subscriptions. There is no question arising on the deed, taken by itself, independently of the rules. His right to redeem is derived, not under the deed, but under the 62nd rule; and is to be exercised upon paying everything which is secured by the deed. And, under the deed, he is to continue his subscriptions up to the end of the Association; and his prospective subscriptions are become due under the provisions of the deed, because it expressly makes all future subscriptions payable and due at the time of making the sale.

Mr. *Prior* replied.

1849.
 MOSLEY
 v.
 BAKER.
 —
Argument.

The LORD CHANCELLOR:—

Jan. 30th.
 —
Judgment.

The decree in this case directs a redemption, which is not objected to by the Defendants. There is not in the mortgage-deed any provision for redemption; the terms, therefore, on which it ought to take place, are to be collected from other sources. I have no doubt of the correctness of Vice-Chancellor *Wigram's* construction of it. The error of the Plaintiff seems to arise from the supposition, that the mortgage was to secure to the Company the sum advanced to him; but such is not the case. The sum advanced was only in anticipation of the value of the shares on winding up the affairs of the Company; and the mortgage, which is to secure the payments which the Company stipulated for, is the consideration for such shares, and constitutes part of the fund out of which the value of such shares was ultimately to be taken. The recital and provisions of the deed are not capable of any other construction. But the part most applicable to the

1849.
—
MOSLEY
v.
BAKER.
—
Judgment.

present case—the provision for selling the property—is most conclusive. For, contemplating the event of the Plaintiff not making the monthly and other payments, it gives the Company the power of selling the property; the proceeds of which they are to retain in respect of all such subscriptions and other payments as should be then, and should thereafter, become due and owing and payable in respect of such shares, calculating the probable duration of such Association; it being agreed, that, in case such sale should take place, all monies which should at any time afterwards become due in respect of the said shares, should be considered as due at the time of such sale, and that the same should be fully deducted and paid out of the monies received, and the amount should be calculated accordingly.

It is obvious, there not being any stipulated terms for redemption, that the Plaintiff cannot be entitled to redeem on terms less beneficial to the Association than those stipulated for in the powers reserved to themselves for selling—powers which are not departed from by the decree for redemption. These, therefore, are the terms binding upon the parties; and of this construction there cannot be any doubt.

But, then, it is said, such terms are different from the rules and regulations of the Association. To this there are two answers: first, there is no such difference; secondly, if there were, the deed alone constitutes the contract between the parties, upon which the Plaintiff rests his case, not seeking to have it altered, but confirmed. This excludes the necessity of inquiring into the first objection. I cannot, however, but observe, that I have not been able to discover any such departure in the deed from the provisions of the rules and regulations as has been suggested. The 37th rule provides for monthly payments; the 59th, for other payments, “until the objects of the Association

have been fully accomplished." The 48th rule, on a security is to be given, is described as a security for the future payments in respect of such share or shares." The 48th rule is inaccurate and obscure; it relates to the clause of sale to be inserted in the mortgage, and not to the redemption; and it provides, that, from the sale, the Association shall retain all such principal subscriptions and payments as shall be then due, owing, and payable, and by virtue of the rules and the mortgage. Now, the money advanced is not due nor payable by the party redeeming it, but the subscriptions are payable during the continuance of the Association. The security taken is to secure such payments. Subscriptions "then due" cannot become subscriptions actually become due in point of time; so, the shareholder, having received the whole estimated value of the shares, would be entitled to have the money restored to him, deducting only those subscriptions the time for payment whereof has actually arrived. The 2nd rule is directly applicable to the present case, it relates to an application for the redemption of the mortgage; and it is quite conclusive, for it provides that, on redemption, the shareholder shall have the amount of his share of the profits, and the subscriptions paid, deducted from the full amount expressed to be secured in and by the mortgage; but the 48th rule directs security for the future payments in respect of such share or shares, not for the money advanced.

I am therefore of opinion, that the mortgage-deed, if it were material to the case, does not depart from the rules and regulations; and, on that principle, the decree is

The future payments are to be taken at their full value, and the decree as to costs is correct. The appeal is to be dismissed, with costs.

1849.
 MOSLEY
 v.
 BAKER.
 Judgment.

1849.

March 14th
& 16th.

Form of order, where, after exceptions to the original bill had been allowed, the Defendant had put in a further answer to the original bill and an answer to the amended bill together, and the Plaintiff wished to refer the further answer upon the original exceptions.

An application by the Defendant to the *Master of the Rolls* to discharge, for irregularity, an order of course, had been refused, with costs; but the order was varied by the *Lord Chancellor*, on appeal, on the ground that the form of the order, though the usual form, was inaccurate:—*Held*, notwithstanding, that the Defendant ought to pay the costs of the motion at the Rolls, and that, although the cause belonged to a Vice-Chancellor's Court, and the Defendant was therefore unable to move at the Rolls to discharge the order, except for irregularity.

WATSON v. LIFE.

THIS was a motion on behalf of the Defendant, that an order obtained at the Rolls, upon the petition of the Plaintiffs, and dated the 19th of December, 1848,—whereby it was ordered that it should be referred to the Master to look into the Plaintiffs' *original bill*, the answer of the Defendant, the exceptions taken thereto by the Plaintiffs, and the further answer of the Defendant, and certify whether the said further answer was sufficient or not on the points excepted to by the first, second, third, sixth, and seventh of such exceptions,—might be discharged for irregularity; or, if the Court should think that it ought not to be discharged for irregularity, then, that it might be discharged under the circumstances of the case.

An application had been first made to the *Master of the Rolls* in January, 1849, to discharge the order for irregularity, when his Lordship refused it, with costs; and this application also sought to discharge that order.

On the 26th of February, 1848, the Defendant filed his answer. On the 29th of April the Plaintiffs filed seven exceptions for insufficiency, all of which were allowed by the Master to whom they were referred, except the fifth. On the 16th of June, 1848, the Plaintiffs obtained an order of course at the Rolls, for leave to amend, and that the Defendant should answer the amendments and exceptions together. The Plaintiffs amended the bill, and filed a new engrossment.

All the interrogatories in the original bill which had been insufficiently answered, remained unchanged in the

All the interrogatories in the original bill which had been insufficiently answered, remained unchanged in the

amended bill, except the one which formed the subject of the fourth exception, which was changed; but the footnote to the amended bill did not require the Defendant to answer any of those interrogatories, except the one which had been changed.

1849.
 WATSON
 v.
 LIFE.
 —
Statement.

On the 8th of December the Defendant filed his further answer, and his answer to the amended bill.

On the 19th of December the order of reference was obtained, which was now sought to be discharged.

When the parties attended before the Master, he thought he was not entitled under the order to look at the amended bill, and that he could not look into the original bill, because it was no longer in existence; and, under those circumstances, he postponed proceeding until the Defendant had had an opportunity of applying to discharge the order.

The petition on which the order of the 19th of December was obtained, stated that the Plaintiffs had filed their bill, and that the Defendant had put in his answer; that the Plaintiffs had filed exceptions for insufficiency, and the Master had certified that they were insufficient; and that he had filed a further answer to *the said bill*. The prayer was, that it might be referred to the Master to look into *the said bill*, answers, and exceptions, and certify whether the Defendant's second answer was sufficient.

Several orders, in other cases, were referred to; but there did not appear to be any fixed form, the Master being directed, in different orders, to look into "the bill," "the original and amended bill," or "the original and amended bills."

1849.

WATSON
v.
LIFE.

Argument.

Mr. *J. Parker* and Mr. *Steere* in support of the motion:—

The petition on which the order was obtained did not state the facts that the bill had been amended, or that an order had been obtained that the amendments and the exceptions should be answered together. The petition ought to have stated all the facts, and left the officer of the Court to deal with them as he thought proper: and, as those facts were suppressed, the order ought to have been discharged for irregularity: *Cooper v. Lewis* (a), *St. Victor v. Devereux* (b), *Arnold v. Arnold* (c), and *Holcombe v. Antrobus* (d).

The issue between the parties is changed by the amendments, and the Master ought to satisfy himself whether the answers are insufficient with regard to the issue which is now raised. A Defendant ought not to answer any of the interrogatories, except those which he is required by the foot-note to answer; and this Defendant is not required by the amended bill to answer any of the interrogatories on which the exceptions were founded.

Mr. *Temple* and Mr. *Gaselee*, for the Plaintiffs:—

The order cannot be discharged for irregularity, because it is in accordance with the form which the officer at the Rolls usually adopts. Even if the form requires amendment, the Plaintiffs ought not to suffer; and, therefore, the application to discharge it for irregularity was properly refused by the *Master of the Rolls*.

By the order the Master was directed to look at the bill. The original bill is the record; and it consists as much of the amendments as of the allegations which were first placed in it.

(a) 2 Phil. 180.
(b) 6 Beav. 584.

(c) 1 Phil. 805.
(d) 8 Beav. 405.

The LORD CHANCELLOR directed the case to stand over, that the Registrar might have an opportunity of seeing what the usual form was.

1849.
 WATSON
 v.
 LIFE.
 Statement.

The following certificate was forwarded to his Lordship by the Registrars:—

“The form of order adopted by the Registrars prior to the Orders of 1828, referring answer where bill has been amended, and Defendant directed to answer amendments and exceptions at the same time, &c. &c. (according to the facts of the case):—

“Forasmuch as the Court was this day informed &c., that the Plaintiff, having taken exceptions to Defendant’s answer, the Defendant submitted to put in a further answer [or the said answer was reported insufficient]; that the Plaintiff obtained an order for liberty to amend his bill, and that Defendant should answer the amendments and exceptions together; that the Defendant put in a further answer to the exceptions, and an answer to the amendments, (that is, he answered the amendments and exceptions at the same time); that the answer was again reported insufficient; since which the Defendant has put in a further answer, which the Plaintiff is advised is also insufficient (a):

“It is thereupon ordered, that it be referred to the Master, to look into the Plaintiff’s bill, the Defendant’s answer, and the Plaintiff’s exceptions, and certify whether the Defendant’s answer is sufficient or not (a).

“ E. D. COLVILLE.	HENRY HUSSEY.
“ J. COLLIS.	E. D. COLVILLE, Jun.
“ R. O. WALKER.	F. R. BEDWELL.
“ HENRY E. BICKNELL.	CECIL MONRO.”

(a) “Since 1828, we add, ‘upon answer.’ See VII of the General the exceptions, No. 1, 2, &c., Orders of 1828.” taken by the Plaintiff to the said

1849.
 WATSON
 v.
 LIFE.
 ———
Statement.

“Form of order to refer answer to amended bill, for impertinence:—

“Forasmuch as this Court was this day informed by &c, that the Plaintiff, upon perusal of the Defendant’s answer to the Plaintiff’s amended bill, is advised that the same is impertinent:

“It is ordered, that it be referred to the Master, to look into the Plaintiff’s bill and the Defendant’s answer, and certify whether the Defendant’s answer be impertinent or not.

“Mr. *Davis*, (Registrar from the Exchequer,) has not signed this paper, because, in the Exchequer, these points were not referred to the Master, but argued in court, at which times the whole of the pleadings were always produced.”

March 16th.

—
Judgment.

The LORD CHANCELLOR directed the order to be varied, so as to make it correspond with the form in the Registrar’s certificate.

With regard to the costs, it appeared that the cause was attached to the Court of the *Vice-Chancellor of England*, and consequently the Defendant could not have moved before the *Master of the Rolls* to discharge the order, on any other ground than irregularity. The *Lord Chancellor* refused to give either party the costs of the present application, but said, that, as the order, which was discharged, was not inconsistent with the usual practice, the *Master of the Rolls* was right in making the Defendant pay the costs of the application to him; and he (the *Lord Chancellor*) should not interfere with that part of the order.

1849.

In re ANSTIE.

April 25th.

TWO petitions had been presented *In the Matter of Peter Sharp Anstie*, a lunatic, not found so by inquisition. The first was presented by Mr. *Bailey*, who was the secretary of a society called The Alleged Lunatics Friend Society, praying that a commission of lunacy might issue: and the other by two brothers of *Anstie*, praying, that, if the *Lord Chancellor* thought that a commission ought to issue, they might have the carriage of it.

Two other petitions of a similar nature had also been presented by the same parties, *In the Matter of Henry Anstie*, a younger brother of *Peter S. Anstie*.

It appeared from the affidavits, that the lunatics were of the respective ages of sixty years and fifty-three years: that they had been placed by their father in the asylum where they were now confined, and that *Peter S. Anstie* had been there since 1809, and *Henry* since 1821, and that all hope of their recovery had been long abandoned.

The father of these lunatics died in 1824, having by his will directed the trustees of the will to invest a sufficient sum to produce an annual income of 350*l.*, and during the life of his son *Peter S. Anstie*, to apply the same, or so much thereof as should from time to time be necessary, for the board, lodging, maintenance, and clothing, and all proper medical care and attendance of his son *Peter Sharp*, so as to administer to him as many comforts as his state and circumstances would admit. And as to so much of the said yearly sum (if any) as should not be applied for the purposes aforesaid, upon trust to invest the same from time to time, so as to accumulate by way of compound

Where a lunatic, entitled for life to a considerable income, had been confined several years in an asylum, among the lowest class of patients, at a small annual expense, and without any particular attendance or comforts, and the accumulations from his income had been divided among his brothers and sisters, an order for the issuing of a commission was made, on the petition of a stranger, and the carriage of it was given to him; and a cross petition of two brothers of the lunatic was dismissed.

—
Statement.

1849.

In re
ANSTIE.

Statement.

interest: and if his son became of sound mind, and continued so for twelve months, the principal fund, with the accumulations, was to be paid to him. He then made a similar provision for *Henry*; and he appointed one of his sons, *Benjamin Anstie*, and two other gentlemen, executors. The annual payments made by the father during his life to the keeper of the asylum, in respect of each of the lunatics, amounted to about 183*l.*, and 12*l.* for extra charges. The same rate of payment was continued by *Benjamin Anstie*, who acted chiefly in the execution of the trusts of the will, till January, 1843, when he died. Shortly afterwards some correspondence took place between one of the surviving executors and the keeper of the asylum, with the concurrence and at the request of the lunatics' family; and the payment was reduced to 110*l.* per annum for each of the lunatics. Since that time they had been confined in the worst department of the asylum, and among the lowest class of patients.

In 1846 the trust fund, which had been set apart for the benefit of the lunatics, amounted to 29,180*l.* New 3½ per Cents; and a part of it, namely, 8400*l.*, was in that year divided among the seven brothers and sisters of the lunatics, or their representatives.

Argument.

Mr. *Malins* and Mr. *Jolliffe* appeared in support of Mr. *Bailey's* petition, and

Mr. *Rolt* and Mr. *Follett* in support of the cross petition.

The principal question was, whether the carriage of the commissions ought, under the circumstances, to be given to Mr. *Bailey*, although he was a stranger to the lunatics and their family; or whether the brothers of the lunatics were not entitled to the carriage of them.

The case of *Ex parte Ogle* (a), was referred to.

1849.

In re
ANSTIE.

The LORD CHANCELLOR:—

I think my course is very clear in this case. I am not sitting in judgment on the conduct of these parties, morally or legally; but my sole duty is to do that which, consistently with the general practice of the Court, is most for the benefit of the unfortunate persons who are the objects of the present application. And therefore, no doubt, the only question—there being no question as to the issuing of the commission—is, who shall have the carriage of it. Mr. *Bailey*, a stranger, applies for a commission to issue to inquire into the state of mind of, and throw protection around, these two unfortunate men. It is said he is the secretary of a society. I do not think it is necessary to inquire what office he holds in that society: he is a stranger, no doubt, and he has difficulties thrown in his way. He has, therefore, to make out that it is a case in which the *Chancellor* would recognise the interference of a stranger. He certainly does not diminish his claim because he acts on behalf of a society of persons who are associated together for the most benevolent purposes. I give no opinion as to the mode in which they may carry out their objects; but they are a body associated together for the most benevolent purposes, and for purposes which, I am sorry to say, notwithstanding all the care which the provisions of the law have established, require some assistance from those who may be disposed to look after their unfortunate fellow-creatures, who are unable to take care of themselves.

Judgment.

That petition was presented in February; and, in the month of March, two brothers of the lunatics present their

(a) 15 Ves. 112.

1849.

In re
*AMSTER.**Judgment.*

petition, in order, if possible, to defeat the petition of Mr. *Bailey*. They, no doubt, would not have presented their petition if Mr. *Bailey* had not presented his. Years have gone by, during which, if they had thought proper to ask for the interposition and for the assistance of the Court in taking care of the interests of their unfortunate brothers, the presenting of a petition for that purpose would have been a very natural and obvious course to pursue; but they preferred the course which was adopted, not asking for the interposition of the Court. Nothing, in that case, could have been done with regard to the persons or property of these two unfortunate men, without the sanction and approbation of the Court. Now, that fact alone would be a pretty strong one in favour of Mr. *Bailey*, because he can only be influenced by good and benevolent motives. The brothers who now come forward and ask for a commission have stated nothing, and claim nothing; and there can be no reason why the application which is made by them was not made years ago. The facts were the same; the state of the lunatics was the same; the state of the property was the same; but they abstain from coming here until they are brought here, in fact, by the petition presented by Mr. *Bailey*. Am I, then, to take from Mr. *Bailey* the carriage of that commission, which it is acknowledged must issue, for which he has applied, and which nobody else applied for until he made the application, when others come forward rather to defeat his application than to obtain the commission on their own behalf?

Without entering at any length into the details which have been brought before me, I have at least these facts: that there are two persons of considerable income, considering the position in which they stand—350*l.* a year apiece, without reference to the savings of the accumulated dividends,—an income ample, in the opinion of their father,

and ample in every body's opinion, as it must be, to do all that is necessary to be done on behalf of persons in their situation. What do I find to be the course adopted by the brothers? I find it commences with a negotiation to reduce the amount to be paid for taking care of them to the lowest possible sum. They offer 100*l.*; they haggle on 100 guineas, and, at last, it is settled for 110*l.*, which is paid for persons who are admitted to be placed on the lowest scale of the establishment in which they were to reside. Now, it is a matter of universal observation, and applies to all cases of the care of lunatics, that the choice is frequently between an extra expenditure or severity to the lunatic. We know very well, that, in many instances, unfortunately, lunatics who are violent are painfully restrained by strait waistcoats, or chained down on the beds. Why are they so treated? Because they have no means of paying for the additional expenses required if they were not so treated. There is nothing to justify cruelty, it is true, but this is always found to be the case; and, if parties are found in that position, and the inquiry is, why they are so treated, the answer is, they are violent, they are paupers, nobody pays for the additional attendance which would be required if they were not so confined; and, therefore, in order to protect others, and to protect them against their own acts, they are obliged to be confined by strait waistcoats or chains. That may possibly, in some cases, be in some degree excusable, from the destitute state of the parties; but it can have no excuse where there are ample funds for the purpose: and these two individuals do not fall under the description of destitute persons. Their lunacy has induced habits which make it necessary either that they should be deprived of the ordinary comforts of life, in order to insure something like cleanliness, or that they should have more expense devoted to attendance, and those frequent changes of linen,

1849.

In re
ANSTIE.

—
Judgment.

1849.

In re
*ANSTIE.**Judgment.*

which, in their unfortunate circumstances, are necessary. Nobody can imagine that individuals subject to those afflictions must necessarily be kept on stone floors, without furniture in the room. Suppose a man of large fortune to be afflicted in that way, can any body suppose, that, of necessity, he should be kept as these two persons are kept? It might be very unnecessary to incur expense for perpetual care and for perpetual change; but that would be merely supplying the wants which are now intended to be supplied, by depriving them of the ordinary comforts of living in a place which may be called habitable. I cannot think, therefore, nor do I believe, that a considerable additional expenditure, properly applied, would not very much have relieved these parties from the discomforts to which they have been exposed.

But I am not entering into that part of the case: it may be or it may not be a matter of inquiry. I am only now considering what is the right course to be adopted with respect to the parties who are to have the carriage of the commission. I find a gentleman who comes forward for the sole benefit of these individuals, and who can have no other possible object; and I find the brothers coming forward, who, instead of administering to the comfort of their two lunatic brothers, have done all they could to reduce the income and the amount which is paid to the proprietor of the house in which they are kept, and have then divided the accumulated surplus between themselves and other members of the family. That has not been attempted to be justified. Mr. *Rolt* has made all the apology for it that the circumstances will permit of; but let me consider for a moment what it is likely to lead to. If I am to pass over a circumstance of that sort, and not to express my disapprobation of it, or consider it as a reason for refusing the parties who are applying for the commission,

that which they are asking for, that may be the course in a hundred other cases. A member of a family has a certain income—an income sufficient to provide for every possible comfort that a lunatic is capable of enjoying—and if I hold out to the members of that family, that they may reduce the income and payments to be applied for his benefit to the lowest possible amount, and may then divide amongst themselves what is accumulated from the savings so created, is that a doctrine which is likely to tend to the benefit of these unfortunate persons? On the contrary, I think it would be a doctrine of the most dangerous possible tendency, and I cannot but think, that, this opportunity having been offered, it is my duty to say that I consider it is most improper. It may be more or less excusable in any particular case, but it is most improper as a system. If it were permitted to be followed by those who are members of a family, of which some individual may be so afflicted, it would have a tendency to do every possible injustice to the unfortunate individual, from pecuniary and personal motives operating on the mind of those who are connected by relationship with that family.

Without, therefore, entering at all into the question, to what extent the comforts of the lunatics might be increased, or to what extent the brothers have been guilty of misconduct in the manner in which they have dealt with the lunatics and their property, I cannot help saying, that it is for the interests, not only of these two unfortunate men, but also of all others who may be in the same situation, not to hold out to members of a family, that they can with impunity thus conduct the affairs of a member of the family until they are discovered, and when discovered, ask for a commission which is to be refused to those who come forward only for the purpose of protecting the interests of the parties concerned. Upon these grounds, therefore, without expressing any further opinion on the conduct

1849.
In re
ANSTIE.
Judgment.

1849.

In re
ANSTIE.*Judgment.*

of the parties, I think it my duty to direct that the commissions issue to Mr. *Bailey*; and I think, for the same reason, and for the same purpose, and on the same principle, it is my duty to dismiss the petition of the brothers, with costs

July 20th.

Ex parte MORGAN, *In re* THE VALE OF NEATH AND SOUTH WALES BREWERY JOINT-STOCK COMPANY.

In pursuance of a resolution passed at an extraordinary general meeting of an unincorporated Company, a shareholder sold his shares to the directors, upon the terms that he should withdraw from the Company, and be no longer liable to any debts of the Company. No power to enter into such an arrangement was contained in the deed of settlement of the Company:—*Held*, that the shareholder was still liable to the debts of the Company, and was properly included in the list of contributories, under the Joint-stock Companies Winding-up Act, 1848.

THIS was an appeal from a decision of the Vice-Chancellor *Knight Bruce*.

An order had been made, under the Joint-stock Companies Winding-up Act, 1848, for winding up the affairs of the Vale of Neath and South Wales Brewery Joint-stock Company. The Master to whom the matter had been referred, had inserted the name of *Israel Morgan* as one of the contributories. But, upon a motion made by *Morgan* to the Vice-Chancellor *Knight Bruce*, his Honor had decided that *Morgan's* liability ought to be confined to the debts, liabilities, and losses of the Company prior to the 18th of June, 1844. The case was now brought before the *Lord Chancellor*, by way of appeal.

The Company was established in 1840, and was regulated by a deed of settlement dated the 3rd of March, 1840. The only clauses in it which were thought in any way applicable to this case, are stated by the *Lord Chancellor* in his judgment.

The capital of the Company was to consist of 125,000*l.*, divided into 6250 shares of 20*l.* each. *Israel Morgan* had six shares in the Company, but had not signed the deed of

settlement. In 1844, their affairs became embarrassed, and, on the 10th of April, 1844, an extraordinary general meeting was held; and in the circulars by which it was convened, the object of it was stated to be to receive from the directors a proposition for paying off some advances recently made, and discharging some other liabilities which were immediately pressing, and to provide for these payments without appropriating to that purpose the funds accruing from the present trade. At that meeting several resolutions were passed, one of which was in the following terms:—"That, if any shareholder shall be desirous of withdrawing from the Company, the directors shall be at liberty to purchase his shares at a price not exceeding 15*l.* per share, on his investing, or procuring to be invested, an amount not less than the purchase-money for his shares, and taking the loan note of the Company for five years at five per cent. for such investment, together with the purchase-money for his shares."

1849.
Ex parte
MORGAN,
In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.
Statement.

In consequence of that resolution, *Morgan* agreed to sell his shares; and a deed was executed, dated the 18th of June, 1844, and made between *Morgan* of the first part, *Buckland*, one of the directors, of the second part, and the trustees of the Company of the third part, by which *Morgan*, in consideration of 90*l.*, assigned his six shares to *Buckland*; and an entry was made in the books of the Company that the shares had been transferred to *Buckland*.

The Vice-Chancellor *Knight Bruce* was of opinion that all the shareholders must be considered as having acquiesced in the resolution, and that *Morgan* was, consequently, not liable in respect of any losses which had occurred since the day on which the transfer had been made.

Mr. *James Russell*, Mr. *Terrell*, Mr. *Bacon*, Mr. *G. L.*
 VOL. I. Y L. C.

Argument.

1849.

Ex parte
MORGAN,*In re*THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.*Judgment.*

Russell, and Mr. *Toller*, appeared for the different parties before the *Lord Chancellor* (a).

THE LORD CHANCELLOR:—

There is no doubt this is an extremely hard case. It is quite clear no harm was meant by the transaction which took place. The party thought, that, by the arrangement he entered into, he was relieved from all responsibility; but the difficulty occurs, and it is a very great difficulty, considering the ground on which the *Vice-Chancellor* proceeded, from the shape and form in which this question arises. The Master is called upon, under the Act, to make out a list of contributories; that is to say, a list of all persons who *may be* liable to contribute to the exigencies of the Company, to make good the funds of the Company. It is quite clear, therefore, that he was bound to include in that list all those who may be liable, under any circumstances; although, as against any particular shareholder, there may be an equity to protect him. Suppose, for instance, it should appear that a shareholder was cognisant of this transaction, that he was present at the meeting, that he assented, and that he was privy to the purchase, and that that particular individual should hereafter, upon the winding up of the affairs, call on Mr. *Morgan* to contribute, in respect of his liability subsequent to 1844, towards the loss he is called upon to pay; in such a case as that, there may be an equity that may arise between individuals, although I cannot tell what, for we have not the facts of such a case before us.

(a) This case was heard before the *Lord Chancellor*, at his private house, in consequence of his

Lordship's state of health; and the reporters are unable to give any statement of the arguments.

I think the Master was bound, under the Act, to place this individual upon the list of contributories. He cannot enter into the question between each individual shareholder. The question is, Is *Morgan* a shareholder, as between himself and the Company? Is he, under any circumstances, liable to contribute towards the fund?

1849.
Ex parte
MORGAN,
In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.

Judgment.

Now, this is a company—not a corporation—it is a mere partnership; and, although the majority of the partners may bind the minority upon every point which the deed authorises, by their common contract, yet they have no authority whatever to bind the minority on any matter that is not within the common contract. The question, then, is, What was the common contract? I find a deed is prepared, which is the origin of the Company, certainly; and under that deed, (because there is no other contract in existence but that deed,) certain persons come in and are shareholders, (whether they became shareholders originally or by purchase is not very material,) whereby they take on themselves the liabilities of the Company. They take on themselves the liabilities of the contract under which the Company is acting. It is equally binding on those who sign the deed and upon those who become shareholders with them. I should think this deed, although not executed by this individual, was a deed binding on him. We all know, unfortunately, that parties enter into these arrangements without knowing anything at all about the contract, or what the liabilities are into which they are entering; and, therefore, when any question arises upon it, you must look and see what has been done.

Now, here is a deed, regularly executed by the directors—not executed by Mr. *Morgan* himself, it appears—but still it was a deed that constituted the formation of the contract between the parties. Under that deed, I find certain provisions made. I find that a party, once a shareholder, has

1849.

Ex parte
MORGAN,
In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.

Judgment.

only certain modes by which he can be relieved from the effect of the liabilities which that situation imposes upon him. He may assign his shares; but that assignment will not relieve him, if it is done without the assent of the directors. If he assigns, and the party to whom he assigns is accepted by the directors, and the assignment is with the approbation of the governing body, no doubt, from that moment, he would be relieved from any liability subsequent to that transaction, because he ceased to be a partner under the provisions of that deed. Not only may he escape in that way, but it may be by an arrangement with the directors themselves; but then, that arrangement must be under the circumstances provided for by the deed.

The 22nd sect. provides, that the directors shall keep in the hands of their bankers a balance equal to the current expenses of the Company; and that, whenever the balance exceeds the current expenses, it shall accumulate, and constitute a surplus fund, and shall remain invested in a prescribed mode; but then, the directors were to be at liberty, under the 23rd sect., to invest—not *any* partnership funds, but this surplus fund—they “may from time to time, by and out of the surplus fund hereinbefore mentioned, purchase and buy up any share or shares in the capital stock of the Company, which shall be offered for sale; and shall at their discretion either sell the same” or merge it in the Company. That being the only clause under which the directors could purchase shares at all—I mean generally, because no doubt there are particular cases provided for—but that being the only clause under which, generally speaking, they could purchase shares, they are only authorised, as between themselves and the shareholders for whom they are acting, to purchase shares, by having a certain fund out of which the purchase could be made.

Then the 44th sect. provides, that, “whenever any share

or shares in the capital of the Company shall become actually forfeited, or shall be duly and effectually vested in any new proprietor, and such entry or alteration in regard to such share or shares shall have been made in the share register-book, as hereinbefore required, then, and not before, the responsibility of the previous owner, as a proprietor in the Company, with respect to the same share or shares, shall, from and after the completion of such entry, and certificate granted as aforesaid, and the payment of all instalments on such shares previously called for, cease and determine as to the same share or shares." Now, that is an express provision, although it was not necessary to make an express provision for any such purpose, stating that anything done, which was not within the power of the deed, should not exonerate the person assigning. It is quite clear, therefore, that, under the deed itself, the directors had no power to purchase under the circumstances in which they did purchase, because they were only to purchase out of a surplus fund, and there was no surplus fund. There was, in fact, the reverse of a surplus fund, because the case is, that all this was done for the purpose of creating, not a surplus fund, certainly, but a fund that was necessary for the objects of the Company.

Well, then, it was a transaction in which the shareholder has not adopted that course by which, and by which alone, under the provisions of the deed, he was to escape from the responsibility incident to his position as a shareholder; and that seems to have been the opinion of the *Vice-Chancellor*, because, no doubt, if he had thought that the liability ceased under any powers of the deed, he never would have resorted to the ground on which he did put it, namely, that he escaped—not from any power in the deed authorising it—but on account of the transactions which took place. I think, as indeed the *Vice-Chancellor* seems also to have thought, in considering what afterwards

1849.
Ex parte
MORGAN,
In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.
Judgment.

1849.

Ex parte
MORGAN,
In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.

Judgment.

took place, that there was a common mistake on the part of Mr. *Morgan* and those with whom he was dealing, that, under the powers of the deed, (if they did think so,) what took place would exonerate him. He never sold to a stranger, with the concurrence of the directors,—that was not the transaction; nor did he deal with the directors under the only power they had of dealing, namely, that which was conferred by the 23rd sect.; but a meeting is called for the purpose of raising a fund. It was argued, (which is the only way in which it could be argued,) that this was a mode of raising a fund. To be sure, under a general notice that you want to raise a fund, you might suppose the most extraordinary resolutions to be passed, which might be about as equally valid as if they were to vote that it should be taken out of the first gentleman's pocket they might meet in the street. They do not specify what they propose to do to raise funds. They merely state that the Company propose to call a meeting to say they want funds. The question is, how the funds are to be provided. That is the point which the meeting has to consider. The parties are merely told in the notice, that they are to meet to consider the propriety of raising funds. The only way in which they can raise a fund is to raise it by some legitimate means within the power of the parties calling the meeting. There was no notice whatever that such a thing would be done as was ultimately done at this meeting.

I am also of opinion the meeting had no power to do what they did. If the deed was binding, it is admitted on all hands that they had no power. Well, being of opinion the deed was binding, they could not go out of the powers of the deed. The directors, and those who were there, met together, and bound themselves not to dispute what they then agreed upon—that may or may not be binding on individuals. I am not looking at what individuals are bound

by; but, is the partnership altogether bound, each and every of its members, by what took place at a meeting which was called ostensibly for a purpose different from that which was the conclusion to which they came? The object, no doubt, was to raise money, but there is no specification in the notice as to the mode in which it is to be raised.

1849.
Ex parte
MORGAN,
In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.

Judgment.

Well, then, as to acquiescence. The thing is not binding on the Company, as such, and therefore cannot operate as any release to Mr. *Morgan*. Then what is there to bind each and every member of the Company? Because, although the partners may, no doubt, however numerous, as other people may, depart from the general contract, yet they cannot depart from it without the consent of every individual member of it. If what they do is not done within the limits of the contract which they had originally entered into, it is not binding on their copartners. Undoubtedly they may form a new partnership. Having entered into a partnership for certain purposes, and under certain conditions, they may, if they please, among themselves, alter the contract and enter into a new contract; but then they cannot bind any one individual, and it cannot be said the partnership, as such, is bound, unless individuals are bound. They may change the constitution of the Company, but that is not what is done. As a partnership, consisting of each and every member who constituted the partnership, they are not bound by any resolution of a majority, or of those who may think proper to attend this meeting; least of all can they be bound, when they were not invited to attend the meeting with a view of doing that which was ultimately done.

It appears to me, therefore, unfortunately for Mr. *Morgan*, that what was done was no release to him under the deed, and that the directors had no power to depart from the deed; and, as to the Company being bound by ac-

1849.

Ex parte
MORGAN,
In re
THE VALE OF
NEATH AND
SOUTH WALES
BREWERY
JOINT-STOCK
Co.

Judgment.

quiescence, I cannot enter into that, unless I have it proved that each individual constituting the Company was present; and I do not understand that to have been the case.

It is a hard case, no doubt—indeed I cannot conceive a more distressing case. If any caution were wanting in these transactions, I think this might be quoted as an instance shewing how hazardous it is to have anything to do with establishments of this sort, unless the parties choose to look after and to make themselves masters of all the transactions which may be entered into. No doubt, this gentleman has considered that no responsibility attached to him after he assigned his shares; but in my opinion, he continued liable for transactions from which, no doubt, he considered himself entirely free. Such is the law for the present purpose; and in saying that, of course I do not mean to say, that, as between himself and individual members, he may not have a good defence; but, as between himself and the Company, as such, I am of opinion there was nothing in the transaction which operated to relieve him from the situation of a shareholder; and, therefore, in the present position of the question, namely, whether he is a contributory or not, I am of opinion the Master was right in thinking he was not released from all the liabilities of the Company by the transaction which took place.

The *Vice-Chancellor's* order, therefore, must be discharged, and the Master's report must be confirmed.

SALKELD v. JOHNSTON.

THIS was an appeal from the decision of Vice-Chancellor Wigram, which is reported in 1 Hare, 196.

The suit was instituted by the Vicar of the parish of *Crosby-upon-Eden*, in *Cumberland*, for an account of certain vicarial tithes. The Defendants were the occupiers of lands; and the Bishop of *Carlisle*, the impropriate Rector, had by amendment been added as a party, but disclaimed all interest. The only ground upon which the Defendants resisted this claim was, that, during the time specified by the Act 2 & 3 Will. IV. c. 100, namely, during the time that two persons in succession had held the vicarage, and for not less than three years after the institution of a third person thereto, and during such number of years as were sufficient to make up the full period of sixty years, and also a further period of three years after the institution of a third person, the lands had been enjoyed without any payment of any such tithes as were claimed by the bill. They did not allege any other legal discharge from tithes.

The evidence supported the defence set up by the answer; but it appeared that tithes had been paid to the Vicar, in respect of other matters which were raised on the lands

have been paid in respect of other titheable matters, the produce of the same lands: (*Semble.*)

Where the claim of a Vicar to tithes of certain matters is met by an allegation of enjoyment of the land for the time prescribed by the Act, without payment of tithes on any of the matters in question, it is not competent for the Vicar to go into evidence to prove payment of tithes in respect of other titheable matters, the produce of the same lands, unless that fact is expressly alleged by him in the pleadings.

Where, upon an appeal to the Lord Chancellor, he considers that the cause ought not to be disposed of without sending a case to a Court of common law, the decree appealed from should be reversed, and a case directed: and the cause is then remitted for subsequent proceedings to that branch of the Court from which the appeal was made.

1843.
 Nov. 17th,
 21st.
 1846.
 Nov. 12th,
 19th.
 1848.
 Nov. 18th,
 20th.
 1849.
 Aug. 2nd.
 Where non-payment of tithes, or the payment of a modus in lieu of tithes, for the period prescribed by the Act 2 & 3 Will. IV. c. 100, is sufficiently proved, the landowner will be protected from the payment of tithes without being required (as before the passing of that Act), to shew the legal origin of the modus, or of the discharge from tithes.
 The operation of the Act is not confined to cases of claim of entire exemption from tithes, but is applicable also to cases of claim of partial exemption, although tithes

1848.
 SALKELD
 v.
 JOHNSTON.
 —
Statement.

occupied by the Defendants. That point, however, had not been adverted to in the pleadings on behalf of the Vicar.

The chief point discussed at the hearing, was, whether, since the passing of the 2 & 3 Will. IV. c. 100, it was sufficient to shew, that, in point of fact, the land had been enjoyed without the payment of tithes, during the period prescribed by that Act; or whether the parties who claimed exemption, were still bound to shew some legal origin for the exemption which they claimed.

The Vice-Chancellor *Wigram* was of opinion, that non-payment alone did not defeat the right of the Vicar to tithes; and he made a decree for an account, in accordance with the prayer of the bill.

The Defendants appealed from that decision, and the appeal came on before Lord *Lyndhurst*, L. C., in November 1843, when his Lordship directed a case for the opinion of the Judges of the Court of Common Pleas; the case and the opinion of the Judges of that Court, two of whom concurred with Vice-Chancellor *Wigram*, and the other two differed from him, are reported in 2 Com. Bench Rep. 749.

The same question was raised before the Court of Queen's Bench, in the case of *Fellowes v. Clay* (a), and the Judges of that Court also were equally divided in their opinion as to the effect of the Act.

This cause was then brought before Lord *Cottenham*, L. C., in November 1846, when his Lordship directed the same case to be sent for the opinion of the Court of Exchequer. That case was afterwards altered at the suggestion of the Barons, and the following paragraphs were inserted:—

“It is also to be assumed for the purpose of this case, that,

(a) 4 Q. B. Rep. 313.

as to some parts of the lands in question, no tithes of any kind, nor money or other matter in lieu thereof, have or has been paid or rendered during the period above mentioned, although during such period not only the titheable matters and things, the tithes whereof are demanded by the Plaintiff's bill, but *other* titheable matters and things grew and arose from time to time, and at various times, upon such parts of the said lands. It is also to be assumed for the purpose of this case, that, as to other parts of the lands in question, no tithes of the titheable matters and things, the tithes whereof are demanded by the Plaintiff's bill, nor money or other matter in lieu thereof, have or has been paid or rendered during the said period, although at various times during such period the titheable matters and things, the tithes whereof are demanded by the Plaintiff's bill, grew and arose upon such last-mentioned lands, and at various other times during the same period *other* titheable matters and things, including corn, grain, and hay, grew and arose upon the last-mentioned lands, and the tithes of all the last-mentioned matters and things have from time to time been paid and rendered. The questions for the opinion of the Court are:—1. Whether a valid and indefeasible prescription or claim of exemption from or discharge of the tithes demanded by the bill, can be maintained under the circumstances stated, as to those parts of the lands, in respect of which no tithes of any kind have been paid during the period mentioned:—2. Whether such prescription or claim can be maintained under the circumstances stated, as to those parts of the lands in respect of which *some* tithes have been paid during the said period."

The Court of Exchequer answered the first question in the affirmative, as to those lands, where all the tithes of all the titheable matters from time to time growing on them, were shewn to have been withheld adversely, and under a claim as of right acquiesced in by the tithe-owner.

1848.
SALKELD
v.
JOHNSTON.
—
Statement.

1848.
 SALKELD
 v.
 JOHNSTON.
 ———
Statement.

But with regard to the second question, they certified their opinion to be, that where a partial exemption only was claimed, and it was shewn that tithes had been paid in respect of other matters raised on the same lands, in that case the Statute did not apply, inasmuch as the lands had not been enjoyed for the prescribed period, without payment of *any* tithes. The case is reported in 2 Exch Rep. 256.

The cause was now brought on again before the *Lord Chancellor*, when his Lordship intimated that it ought to have been taken before the Judge, by whom the decree was pronounced in the first instance; but, on referring to the order made by Lord *Lyndhurst* in 1843, it appeared that that order did not reverse the decree of Vice-Chancellor *Wigram*, as it should have done, according to the form in which such orders ought to be drawn up (*a*), but merely sent a case for the opinion of a Court of common law. The *Lord Chancellor*, under these circumstances, allowed the case to proceed before him, but said that such a decree was quite irregular.

Argument.

Sir *Francis Simpkinson* and Mr. *Fleming*, appeared for the Plaintiff; and Mr. *Wood*, Mr. *Eagle*, and Mr. *Malins*, for the Defendants.

The line of argument which was adopted, was similar to that which had been employed on the former occasions.

(*a*) *Sowdon v. Marriott*, 2 Ph. 623.

The LORD CHANCELLOR (a):—

The Vice-Chancellor *Wigram* decreed payment of certain tithes against the Defendants, who had pleaded the Statute 2 & 3 Will. IV. c. 100, and proved non-payment of the particular tithes claimed within the period required by the Act; holding that such non-payment was no protection under the Act, without proof of the legal origin of the discharge. Lord *Lyndhurst*, upon an appeal from that decree, directed a case for the opinion of the Judges of the Common Pleas. They were equally divided, Chief Justice *Tindal* and Mr. Justice *Cresswell* agreeing with Vice-Chancellor *Wigram*; but Mr. Justice *Erle* and Mr. Justice *Coltman* holding that the defence under the Act was complete. Upon this certificate, the case came before me; and finding that the Judges of the Common Pleas were equally divided, and that when the same question came before the Queen's Bench, in *Fellowes v. Clay* (b), the Judges of that Court were also equally divided, Lord *Denman* and Mr. Justice *John Williams* concurring with Mr. Justice *Erle* and Mr. Justice *Coltman*; and Mr. Justice *Patteson* and Mr. Justice *Coleridge* agreeing with the Chief Justice and Mr. Justice *Cresswell*: I directed that the same case should be submitted to the Court of Exchequer; and upon this point the *Chief Baron* and Baron *Parke*, Baron *Alderson*, and Baron *Platt*, have certified their concurrence with the opinion of Mr. Justice *Erle* and Mr. Justice *Coltman*. The result, therefore, is, that of the twelve Judges who have given opinions upon this point, eight differ from Vice-Chancellor *Wigram*, and four concur with him.

It is now my duty to come to the best conclusion I can, upon a question, of which the difficulty is best proved by the diversity of opinion amongst the Judges. The question

1849.
SALKELD.
v.
JOHNSTON.
—
Judgment.
Aug. 2nd.

(a) This judgment was delivered out in writing, the *Lord Chancellor* having been prevented by

illness from attending Court.
(b) 4 Q. B. Rep. 313.

1849.
 SALKELD
 v.
 JOHNSTON.
 ———
Judgment.

must depend upon the construction of the Act; it is, however, not only a legitimate, but a proper course, first to consider the position, at the time it passed, of the subject-matter upon which it was intended to operate. This subject-matter is by the Act described to be “prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition real or otherwise,” treating the *modus* and the discharge as one and the same, for the purposes of the Act, and providing the same remedy for each. This I think an important consideration, because some of the learned Judges who support the Plaintiff’s right to the tithes, found their arguments very much upon the supposed distinction between rules of law, as applicable to *moduses* and discharges; and, no doubt, different rules have been applied to compositions real, the reason for which is not very apparent, but the foundation of the right of the occupier is the same in all.

As in former times it was competent for the parties interested, to agree to the payment of a *modus* in lieu of tithes in kind, proof of immemorial payment of such *modus* and non-payment of tithes in kind was a sufficient defence against the claim for tithes, upon the ground that the prescription is held to be proof of a grant or arrangement about property, which the parties were competent to enter into; but the immemorial payment was only evidence of the agreement, that being the foundation of the right claimed.

In the ordinary case of a discharge, claimed upon the ground of the lands having belonged to one of the greater monasteries dissolved by *Henry VIII*, the principle will be found to be the same. Those monasteries were capable of holding their lands discharged from tithes: the lands were not necessarily so discharged, but the establishments were competent to hold them discharged. When, therefore, it appeared that no tithes had ever been paid by them, a

discharge was presumed, as it might have had a legal foundation. Here, again, the non-render of tithes was only available as evidence of the supposed arrangement of the religious house, upon which the discharge at the present time rested. I am considering the case, as if the religious houses had continued to this time, and were in possession of the land, the Statute of *Henry VIII* having only given to the lay proprietors the same right which the religious houses had before enjoyed.

1849.
 SALKELD
 v.
 JOHNSTON.
 —
Judgment.

In both these cases, immemorial usage was necessary to establish the right claimed, the foundation of which could not be proved; but in fact such usage was in ordinary cases assumed, upon proof of comparatively modern practice; in both, however, it was competent for the party claiming the tithe to meet such presumptive proof, for the purpose of shewing that the conclusions to which it tended could not be well founded, and that in fact there was not a legal foundation of the discharge claimed.

In the case of a discharge by composition real, these principles were not strictly followed, nor indeed the rules which regulate all other cases of prescription. Up to the disabling Statutes in the reign of *Elizabeth*, it was competent for the tithe-owner and the landowner to enter into a composition real, with the concurrence of other requisite parties; it might therefore have been expected that the enjoyment of the land without any render of tithes from time immemorial would be received as evidence of an arrangement between parties who were at the time competent to enter into it. But such was not the course adopted, for the party setting up the composition real was required to produce the deed by which it was effected, or some evidence of its having been executed. This Mr. Justice *Erle* properly describes as an anomaly, and it was so manifestly unjust that the Courts at last only required slight evidence

1849.
SALKELD
v.
JOHNSTON.
—
Judgment.

of its having existed. In this case the difficulty was therefore greater than in the former; for not only had the occupier to prove the immemorial non-render of the tithes, but also to give some evidence of the legal origin of his claim of discharge, and, as in other cases, to meet any evidence his adversary might produce tending to negative the foundation of his title.

Such was the state of the law when Lord *Tenterden's* Act passed; and such was the difficulty which persons holding land legally discharged from the payment of tithe in kind had to contend with, when compelled to defend such legal right. By the first sect. of that Act it is enacted, "that all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real, or otherwise, shall, in cases of claims by laymen other than corporations sole, be sustained and be deemed good and valid in law, upon evidence shewing in cases of claim of a *modus decimandi* the payment or render of such modus; and in cases of claim to exemption or discharge, shewing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless it shall be proved that such render or payment had been made prior to such thirty years; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless such payment or render was made or enjoyment had under some consent or agreement in writing; and where the demand is made by any corporation sole, every such prescription or claim shall be valid and indefeasible upon evidence showing such payment or render of modus made, or enjoyment had," for the periods therein specified.

Such being the enactment, the Defendants have set up a prescription and claim to an exemption from, and discharge of, tithes of certain matters and things, and they have proved the enjoyment of the land without payment or render of such tithes, or of money or other matter in lieu thereof, for the full period required by the Act; upon which proof the Act declares that such prescription and claim shall be sustained and held good and valid in law, and shall be absolute and indefeasible. But the decree of the *Vice-Chancellor* has held such proof to be of no value or validity, and has decreed the payment of tithes notwithstanding such proof. I cannot find any ambiguity in this enactment, or any flexible expression capable of different meanings. If, therefore, other parts of the Act led to the belief that such was not the real intention of the Act, I do not see how it could be possible to control so positive an enactment; but I am of opinion that all the other parts of the Act confirm the natural meaning of the words, and that the construction put upon it by the decree would deprive it of nearly all its value, and render it all but inoperative. The 7th sect. enacts, "that in all actions and suits it shall be sufficient to allege that the modus or exemption or discharge claimed was actually exercised and enjoyed for the period mentioned; and if the other party shall intend to rely on any matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged." The Act says, that the allegation of enjoyment of the right claimed during the period prescribed shall be a sufficient answer to the action or suit. Can it then be contended that such allegation affords no defence; but that, in order to meet the demand, much more must be alleged and proved, namely, such facts as were necessary before the Act to show the legal origin of the exemption? That nothing more need be alleged than the simple fact of the exercise and

1849.

SALKELD

v.

JOHNSTON.

Judgment.

1849.
 SALKELD
 v.
 JOHNSTON.
 —
Judgment.

enjoyment of the discharge claimed, is positively enacted by this 7th sect.; was it then intended that the Defendant should go into evidence, and prove what he was not required to plead or to put in issue? If the Plaintiff had anything to allege why the defence should not prevail, he was required to allege it specially, and was not to be at liberty to give any evidence of it, on any general traverse or denial of the matter claimed. If the Defendant was bound to prove more than the enjoyment pleaded, the Plaintiff, not having specially alleged any matter, is prohibited from going into any evidence to meet such further proof; shewing that without some special allegation, the whole contest between the parties was to be confined to the simple fact of the exercise and enjoyment which were alleged. If then nothing need be pleaded but the exercise and enjoyment of the discharge during the stipulated period, and if such exercise and enjoyment are by the Act declared to make the claim valid, absolute, and indefeasible, it is not easy to conceive any reason why the Defendants, having so pleaded and proved all which the Act requires, nothing being alleged to the contrary by the Plaintiff, are not to have the protection of the Act; but so some of the most able Judges at law and in equity have thought, and their opinions being entitled to the greatest respect, the grounds upon which they are founded must be carefully examined.

Vice-Chancellor *Wigram* rests his opinion principally upon the preamble of the Act, which recites that the object was to shorten the time required for the valid establishment of claims of modus or exemption; and, considering that before the Act several things were required besides length of time,—such as, in the two principal grounds of exemption, possession by one of the greater monasteries, and, in the case of a composition real, the fact of a deed for that purpose having been executed,—

holds that these matters must still be proved; but, being proved, the time required by the Act shall be sufficient. The first answer to this argument is, that time, as such, never was requisite for these grounds of discharge. It was only available as a means of proving such things as were requisite, as, in the case of abbey lands, that the lands in question had belonged to one of the greater monasteries, and that such monastery held them discharged of tithes, in which case the Act of *Henry VIII* gave to the lay proprietor a right to the same defence. But for this purpose it was necessary to show the history of the property 300 years ago, not only as to the possession by the abbey, but that the lands were held by it discharged from tithes. If all this were capable of direct proof, no question would arise upon the lapse of time. So in the case of a discharge by composition real; if the deed be produced with all proper parties, time would be immaterial; but at this period such direct proof cannot in ordinary cases be produced; practically, therefore, the cases are found to depend upon the inference arising from length of time. The fact of non-payment even within modern times was considered sufficient proof that the abbey had held the lands discharged from tithes; and non-payment, coupled with slight evidence of a deed having existed, was sufficient to establish a composition real: and in cases of modus the non-payment of tithes and the payment of the substituted duty were sufficient to establish the fact of an agreement at the time at which it could have been legally entered into. But in all cases time was only the medium of proof, and the inferences from it were liable to be rebutted by any positive evidence inconsistent with such inferences. When such attempts were made, it became necessary to enter into an investigation of proofs of a date so remote as to preclude the hope, in many cases, of coming to any certainty or satisfactory conclusion, and in all cases leading to great expense. The preamble is therefore obviously in-

1849.

SALKELD
v.
JOHNSTON.

Judgment.

1849.
SALKELD
v.
JOHNSTON.
—
Judgment.

accurate in speaking of shortening the time required for the valid establishment of claims of modus and discharge, none being required; but it appears to me to mean, that the expense and inconvenience of suits for tithes ought to be prevented, by establishing a certain limitation of times for those purposes, after which claims of moduses and discharges should not be questioned.

It was also said, that the Act uses the technical terms modus and discharge; but that, as the law knows no modus or discharge, except connected with circumstances necessary to give them validity, the Act can only be held to refer to such moduses and discharges as would have been valid before the Act. It would, perhaps, be a sufficient answer to this argument, that the Act does not profess to deal with moduses and discharges, but with *claims* to moduses and discharges; and it is evident, that if this construction should prevail, the Act, instead of being a protection to the occupier, would in many cases be prejudicial to him. Under the law, as it was applied in practice before the Act, a comparatively short modern usage of non-payment, not met by any contrary evidence, was sufficient proof of immemorial non-payment and of all the inferences arising from it; whereas, under this construction of the Act, it might be necessary to extend such proof to sixty years, or to two incumbencies, and three years of a third, which might embrace an entire century. The *Vice-Chancellor* says, that the Act only professes to aid the proof of a modus, and not to make good a modus which would otherwise be invalid. Suppose a payment claimed as a modus proved to have been paid during the period required by the Act, could the Plaintiff be permitted to shew that such payment could not have had a legal origin by reason of its rankness? If such proof could be made, and it was to be admitted, the whole object of the Act as to moduses would be defeated; and if it could not be admit-

ted, then the Act has made that a good modus, which was previously invalid.

1849.
 SALKELD
 v.
 JOHNSTON.
 Judgment.

The opinions of Chief Justice *Tindal* and Mr. Justice *Cresswell* are founded upon the same grounds, assuming that before the Act time constituted the essence of a valid modus, and was only one of the essential grounds of a discharge, and that the Act intended to deal with one essential only, namely, time, and to leave the other untouched—a supposition contrary to the expressed terms of the Act, and inconsistent with the legal state of the interests upon which it was to operate. It seems, indeed, to be admitted, that, in cases of modus, enjoyment for the time prescribed supersedes the necessity of any other proof; and why not as to claims to discharges? One sentence embraces both. Suppose the words “by composition real or otherwise,” had been omitted, and the enactment had been, that all claims to discharges of tithes should be deemed good and valid in law, and absolute and indefeasible, upon proof of enjoyment for the prescribed time, and that nothing but such enjoyment need be pleaded; could it be contended, that the particular ground of discharge must be pleaded and proved, and its legal validity established? And if so, how much of such legal validity need be proved? Certainly not what was before necessary; because the discharge from tithes in favour of the abbey at the time of the dissolution—an essential part of the title to the claim before proved by immemorial non-payment—need no longer be so proved. The words “by composition real,” are introduced by way of example only, and the subsequent words, “or otherwise,” render them useless; the whole being tantamount to an enumeration of every possible ground of discharge, which would be equivalent to the simple words, “all claims to discharge from tithes.” Upon this principal point, with all respect and deference to the opinions of the very eminent Judges who have

1849.
 SALKELD
 v.
 JOHNSTON.
 ———
Judgment.

thought otherwise, I do not hesitate to concur with the great majority who think, that, under the Act, the simple fact of enjoyment of the discharge claimed, for the prescribed time, is all that need be pleaded and proved as an answer to a demand for tithes.

Another point has been raised by Vice-Chancellor *Wigram*, and glanced at by Chief Justice *Tindal* and Mr. Justice *Cresswell*, and adopted by the *Chief Baron* and the other Barons, and for which, therefore, there is a much greater balance of authority than upon the other point in support of the decree, although Chief Justice *Tindal* and Mr. Justice *Cresswell* abstained from giving any opinion on it. The question is, whether the Act applies to cases in which the claim is not for a discharge from *all* tithes of the land in question, but from *some* of such tithes only. The fact that tithes had been paid for other matters produced upon the lands in question, is not alleged, or put in issue in the pleadings; but, the bill claiming tithes only of certain titheable matters and things, the answer, meeting the claim made, says, that no tithes, &c. have been paid for the said titheable matters and things during the period specified in the Act. The case sent for the opinion of the Judges of the Common Pleas, notwithstanding the suggestion of Vice-Chancellor *Wigram*, was in conformity with this state of the case upon the pleadings; and the question put was, whether under the Act the discharge claimed could be maintained under the circumstances before mentioned? That the claim was for a discharge of the tithes of certain specified matters, and not for all tithes produced upon the lands in question, was open for consideration under this case, but not the fact that tithes had been paid for other matters; but the opinions of the Judges did not turn upon that point, Chief Justice *Tindal* and Mr. Justice *Cresswell* only alluding to it, but not giving any opinion upon the question; and Mr. Justice *Coltman* and Mr. Jus-

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1849.

SALKELD

v.

JOHNSTON.

Judgment.

1849.
SALKELD
v.
JOHNSTON.
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Judgment.

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tice *Erle* abstaining from any observations upon it. When the same case was argued before the Barons of the Exchequer, they must have been of opinion, that, upon the case so stated, the question did not arise, for they suggested that the case should be altered, in order to raise it; and, accordingly, the Defendants, I presume, consented to an insertion in the case, of a statement that the tithes of other matters produced upon the same land had been paid. This was, perhaps, an improvident consent on the part of the Defendants, because, if the answer properly pleaded the defence under the Act, and the Plaintiff intended to rely upon the fact of other matters from the same land having paid tithes, he ought, it would seem, under the 7th sect., to have alleged such matter specially, which he had not done. This improvidence will not, however, affect my judgment upon the appeal, because I must dispose of the case as it appears upon the pleadings. In one respect, indeed, the Defendants have an advantage from the alteration made in the case, as it may be assumed, that, in the opinion of the learned Barons, the point was not open to the Plaintiff. I cannot consider it as a fact, that tithes were paid for other matters from the same lands; but the point suggested by the Vice-Chancellor *Wigram*, that the discharge is claimed in respect of certain matters only, and those, in fact, of modern introduction, is clearly open to the Plaintiff, and calls for my decision. Upon this two questions arise: First, does the Act apply to claims of discharge of some only of the titheable matters? Secondly, if it does not, can the Plaintiff upon the pleadings avail himself of that point?

Vice-Chancellor *Wigram*, in discussing this part of the case, relies much upon the fact, that some of the matters in respect of which the Defendants claim to be discharged from tithes, were not known until after the time of legal memory; and after adverting to the law,

1849.
 SALKELD
 v.
 JOHNSTON.
 ———
Judgment.

1849.

SALKELD

v.

JOHNSTON.

Judgment.

that a modus for such matters might, nevertheless, be good, says, that a contract before the time of legal memory not to pay tithes of titheable matters then unknown, and thereafter to be introduced, would be merely void for want of consideration. If this be so, would it not follow that there could not be any discharge for tithes of matters not known before the time of legal memory; that is, no general discharge for all titheable matters? All such discharges are founded upon contracts, though not now capable of proof, or specific exemption. The consideration for a modus differs only from the consideration for a discharge, because it is a remaining and continuing consideration; and if it may be good for articles recently introduced, so may the discharge; the one case assumes a contract that the land should be free from all tithes, in consideration of the modus; and the other, that it shall be free from all tithes under the arrangement made, or by virtue of some specific exemption. The principle of the rule as to produce, subsequently introduced, is equally applicable to both. Then the words of the Act, coupling moduses and discharges in the same sentence, enact that every claim of modus or discharge shall be held to be valid, absolute, and indefeasible after the enjoyment specified. I think, therefore, that there is no foundation for the observation made as to some of the matters being of modern introduction; some of them indeed are as old as the land itself, such as grass not made into hay; but still the defence applies only to certain matters, so that if the Act applies only to lands for which no tithes whatever have been paid, the defence may not be supported by the Act. Upon this point the Barons of the Exchequer, and Chief Justice *Tindal*, and Mr. Justice *Cresswell*, rely upon the words of the Act, which require the occupiers to shew the enjoyment of the land without payment, or render of tithes, money, or other matters in lieu thereof, for the period specified; which, they conceive, means without payment or render of any tithes, as well of

as to which no discharge is claimed as of the mat-
 spect of which the discharge is claimed. I cannot
 is the proper construction of the term used, or the
 ning of "tithes," as used in the Act. It is not
 that there may be a valid discharge as well as a
 dus for any particular description of titheable mat-
 ell as for *all* the tithes of the land; when, there-
 Act speaks of "all claims of or to any exemption
 lischarge of tithes," it must apply to and include
 al and particular as well as general discharges;
 the same clause the same word is several times
 a fair and true construction is to attach to it the
 aning wherever it occurs. The Act, then, dealing
 tial and particular as well as general discharges,
 "that in cases in which render of tithes in kind
 hereafter demanded," meaning a demand of tithes
 ular matters as well as of all matters, "the claim
 rge shall be held to be good and valid in law, and
 and indefeasible upon evidence shewing the enjoy-
 the land without payment or render of tithes,
 r other matter in lieu thereof" for the prescribed
 This payment or render of tithes is obviously the
 that before spoken of, namely, the tithes de-
 just as much as if the word "such" had preceded
 "tithes." If payment or render of any tithes was
 ve the discharge as to all others, the word "any"
 necessary to precede the word "tithes;" but the
 not be implied, there being no antecedent to sup-
 The Act makes the defence applicable to all claims
 rge, but the proposed construction would confine
 ms for total discharge of all tithes. The 7th sect.
 that it shall be sufficient to allege that the dis-
 aimed was actually exercised and enjoyed during
 ired period. In the case supposed, the discharge
 was for the tithe of particular articles only; but
 nstruction contended for, the allegation must be

1849.
 SALKELD
 v.
 JOHNSTON.
 Judgment.

A A

L. C.

1849.
 SALKELD
 v.
 JOHNSTON.
 ———
Judgment.

not only of the exercise and enjoyment of the discharge claimed, but of a total discharge.

Taking, therefore, the very words as they stand, I should not hesitate to consider the tithes not rendered or paid identical with the tithes demanded ; but had there been doubt as to the meaning of the words, the extraordinary consequences which would follow from the construction contended for, would justify some violence being done to the ordinary meaning to avoid them. All claims to discharges for tithes of particular matters would be taken out of the operation of the Act, and for what reason ? If lands might be legally discharged from the tithes of the particular matters, though liable to tithes in kind for others, why was the new law not to be applicable to such cases ? Were not suits in such cases productive of the expense and inconvenience which the Act intended to prevent : and if within the mischief, why are they not within the remedy ? And why, when the Act provides a defence in all cases of claims of or to any exemption from or discharge of tithes, is it to be held that no such defence shall be available, except in cases in which the discharge claimed is for the tithes of *all* matters ? The terms used in the Act, and the provision it contains, and its unquestionable object, appear to me to negative the construction contended for. Vice Chancellor *Wigram* distinctly raised this point, but in the case sent by Lord *Lyndhurst* to the Common Pleas, there were not any facts stated to raise it ; and when the cause came before me, notwithstanding the observations of Chief Justice *Tindal* and Mr. Justice *Cresswell* upon this point, the counsel were contented to go to the Exchequer upon the same case. It was at the suggestion of the Barons that the alteration was made. Had this been otherwise, upon the construction of this part of the Act, I should have found great difficulty in giving to the Plaintiff in this cause the benefit of the construction contended for. The Defendants have strictly followed the directions of the 7th

sect., in stating their grounds for a discharge from the tithes claimed. If the Plaintiff meant to rely upon any matter of fact or law in answer to such defence, he ought under that section to have alleged it specially; but the fact of payment of other tithes is not alleged or put in issue, and no evidence is to be received of it if not so specially alleged.

1849.
SALKELD
v.
JOHNSTON.
Judgment.

Having given to this case the most careful consideration, which its importance and the diversity of opinion amongst the Judges called for, I am of opinion that the Defendants are, under the circumstances, entitled to the benefit of the Act, and that the Plaintiff's bill ought at the hearing to have been dismissed with costs. I therefore substitute an order for that purpose in the place of the decree of Vice Chancellor Wigram.

A point was submitted to the *Lord Chancellor*, whether, if the decree were drawn up dismissing the bill *with costs*, those words would, without any special direction, include the costs of the case sent to the Courts of common law; and a case of *Humphrey v. Geary*, before Vice Chancellor *Knight Bruce*, was cited, in which his Honor held, that the costs of a case sent to law would be included in the costs of the cause, without their being specifically mentioned.

Dec. 10th.
Where a bill is dismissed with costs, the costs of a case sent to law will not necessarily be included, unless specifically mentioned in the decree—*Semble.*

The LORD CHANCELLOR expressed his opinion that the costs of a case sent to a Court of law would *not* necessarily be included in the costs which a Defendant would be entitled to receive under a decree dismissing a bill *with costs*; but added, that it was not necessary for him to make a decision upon the point in the present case. He thought the Defendants in this case ought to have the costs of one of the cases sent to law (a), and that an express direction to that effect ought to be inserted in the decree.

The Defendants elected to have the costs of the case sent to the Court of Common Pleas.

(a) See *Bearblock v. Tyler*, Jac. 571.

1849.

April 27th
& 28th.
May 4th.

In re BROWN.

It is no objection *per se* to the committees of the estate of a lunatic, that they reside at a distance from the lunatic's estate.

The 13th of the General Orders in Lunacy, of October, 1842, merely authorises, in certain cases, a reference to the Master in lunacy, without a previous order of reference from the *Lord Chancellor*; but the report of the Master cannot be acted upon until it has received the sanction of the *Lord Chancellor*.

Where committees had exceeded their authority by expending large sums in draining, and in enter-

ing into an agreement with a Railway Company respecting the mode in which the railway should pass through the lunatic's estate, and in other particulars, but all those acts had been sanctioned by the Master in lunacy, the Court refused to remove the committees.

The accounts of a lunatic's estate had been regularly passed before the Master in lunacy, by the committees, in the presence of a solicitor, who acted for the mother of the sole heiress-at-law, and sole next of kin of the lunatic—the heiress, an infant, residing with her mother, and not having had any guardian appointed. A petition afterwards presented in the name of the infant heiress-at-law by her mother, who had then been appointed guardian by the Court of Chancery, to have the accounts re-opened, was dismissed, with costs.

Principles on which the Court acts in providing for the personal management of a lunatic, with reference to the amount of his income, and the desirableness of his residing in his own house or at a lunatic asylum; and also in allowing expenses incurred by the committees, irregularly and without authority, but by mistake, and with the sanction of the Master in lunacy.

THE petition in this case was presented by “*Elizabeth Caroline Brown*, an infant, the heiress-at-law and sole next of kin of the lunatic, by *Elizabeth Mary Heselton*,” described as “her guardian, appointed by the High Court of Chancery;” and it prayed that *Richard Heywood Jones* and *Samuel Henry Thompson*, committees, appointed under the lunacy, of the person and estate of the lunatic might be discharged from their office; and that it might be referred to the Master to appoint other fit and proper persons as committees of the estate and person of the lunatic, and to approve of a scheme for the future management of the lunatic and his estates; and that the Master's reports on the first, second, third, and fourth accounts, might be taken off the file of the Court; and that the accounts for the years 1843, 1844, 1845, and 1846, might be re-opened and re-passed in the presence of the Petitioner; and that the costs of the application, and consequent thereon, might be paid by the two committees.

In the year 1828, the lunatic, *John Brown*, had been placed by his father, *William Brown*, in a private establishment, near York, for the reception of persons of unsound

mind. *William Brown* died in April, 1838, having by his will, dated in 1833, appointed *Richard Heywood Jones* and *Samuel Henry Thompson*, who were bankers at Liverpool, the guardians of the lunatic and his estates; and he devised a part of his estate and effects for the benefit of his only other son, *Charles Edward Brown*. *Charles Edward Brown* died in October, 1838, leaving his wife, *Elizabeth Mary Brown*, who afterwards married a second husband, *Joseph Heselton*, and also leaving the Petitioner, his only child, who was also the sole heiress-at-law and next of kin of the lunatic.

1849.
In re
BROWN.
Statement.

In the year 1839, a commission of lunacy was issued against *John Brown*, on the petition of *Elizabeth Mary Brown*, who acted by Mr. Wood, a solicitor, who was also solicitor to *Richard Heywood Jones* and *Samuel Henry Thompson*; and by the inquisition thereupon taken, *John Brown* was found to have been of unsound mind since the 1st of August, 1828. By an order of the Lord Chancellor, made in the lunacy, dated the 15th of February, 1840, on the petition of *Elizabeth Mary Brown* and *Richard Heywood Jones* and *Samuel Henry Thompson*, the custody of the person and the care and management of the estates of the lunatic were granted to *Richard Heywood Jones* and *Samuel Henry Thompson*. The Master in lunacy, by his report in the matter, dated the 19th of April, 1842, found (amongst other things) the clear net income of the lunatic's estate, for the year ending December, 1840, to be upwards of 1300*l.*, and that 460*l.* would be proper to be allowed annually for the maintenance of the lunatic; and that 400*l.* was a proper sum to be allowed for the purchase of a carriage, horse, and harness, for the use of the lunatic; that, as the lunatic's unsoundness of mind arose solely from a deficiency of mental power, it had been suggested, that the lunatic might be occasionally taken, under the care of a proper attendant, with the sanction of his physician, upon

1849.

In re
BROWN.*Statement.*

a visit of amusement to *Harrogate* or *Scarborough*, and occasionally to see his estate at *Ormsby*, each of which places was within 45 miles distance from *York*. That report was afterwards confirmed by the *Lord Chancellor*, by an order made on the petition of the committees; and it was at the same time ordered, that the Petitioners (the committees) were to be allowed, in passing their future accounts, such a sum, not exceeding 100*l. per annum*, as the Master should find to have been properly expended by the committees on visits of amusement by the lunatic to *Harrogate* or *Scarborough*, and occasionally to see his estate at *Ormsby*. *Elizabeth Mary Heselton* intermarried with her present husband, *Joseph Heselton*, in April, 1846; and on the 4th of May, 1846, in consequence of that intermarriage, and circumstances that had transpired with reference thereto, *William Wood*, by the direction of *Richard Heywood Jones*, filed a bill in equity in the name of the Petitioner, by *Richard Heywood Jones*, as her next friend, seeking the appointment of a guardian to the Petitioner; and shortly afterwards, *Elizabeth Mary Heselton* was appointed such guardian. The committees resided at a distance considerably exceeding 100 miles from the residence of the lunatic, and seldom visited the lunatic; and they had appointed a highly-respectable and well-qualified person, named *Taylor*, who resided at a distance of 146 miles from the lunatic's estates, to take the management of them and to collect the rents, at a salary of 100*l. per annum*; large sums of money had been laid out by the committees in building a tilery, and in draining parts of the lunatic's estates (the soil being principally of a clayey character); and they had also felled timber growing on the lunatic's estates to the amount in value of 500*l.* or thereabouts: all this was done with the knowledge and sanction of the Master in lunacy, but without the sanction or confirmation of the *Lord Chancellor*. Another subject of complaint stated in the petition was, that the commit-

ad, without the sanction of the *Lord Chancellor*, as-
 l to an Act of Parliament authorising a railway to
 hrough the lunatic's estates, and that they had also
 l with the Railway Company for the purchase of such
 ns of the lunatic's estates as were required by them
 e completion of the railway. The petition alleged
 neither the Petitioner nor her guardian had ever been
 lted in any one instance as to the management of the
 s of the lunatic, down to the year 1847, and that the
 rance of *William Wood* on the various proceedings
 assing of accounts in the Master's office, up to that
 as the Petitioner's solicitor, was wholly unauthorised
 ithout the Petitioner's knowledge or sanction. From
 vidence adduced on the part of the Respondents it
 red that *Elizabeth Mary Heselton* had been in the
 ant habit of consulting and advising with *William*
 on her affairs and the affairs of her former husband,
 he education, prospects, and property of the Peti-
 ; from the year 1838 down to the year 1846. *William*
 had also had frequent conversations, previously to
 ear 1846, with *Elizabeth Mary Heselton* and Messrs.
 and *Thompson*, relative to the management of her per-
 estate, and also that of the Petitioner; and the Peti-
 was not made a ward of court earlier by reason of
 es of income that would ensue on the institution of a
 n equity making her a ward of court, whereby her
 al estate would be ordered to be invested in the
 e funds. At the time of obtaining the commission of
 y the Petitioner was only six years of age. Between
 ear 1840 and 1846, divers bills of costs of *Elizabeth*
Heselton, incurred in the lunacy, were taxed, and
 to *William Wood* as her solicitor therein, out of the
 ic's estate; and during the same period numerous bu-
 letters passed between that lady and *William Wood*.
 nonies laid out in the draining of parts of the luna-
 states appeared from the report of an eminent sur-

1849.

In re
BROWN.

Statement.

1849.

In re
BROWN.*Statement.*

veyor to have been expended beneficially to the property, and the tenants contributed a per-centage towards the expense of the drainage, in proportion to the land drained in their occupation. The tile-works erected on the lunatic's estates were proved to have been the cause of much saving of expense to the lunatic, on account of the superiority of the tiles made thereat, and the greatly-diminished cost thereof in comparison with the tiles previously purchased for the purposes of draining. It appeared that the committees and their solicitor, *William Wood*, during the various proceedings in the lunacy in the Master's office, never understood from the Master that it was necessary, in order to enable the committees to get the sums expended by them in draining, &c. allowed in their accounts, that the several orders of the Master respecting the draining of the lunatic's estates should be confirmed by the *Lord Chancellor*. The arrangement with the Railway Company for the sale of part of the lunatic's estates appeared clearly a beneficial one also, and the timber that had been felled by the committees consisted principally of the thinning of the woods, which had been much neglected and ought to have been thinned, according to the opinion of the manager, twenty years ago; and no trees had been felled except such as were proper to be removed in order to promote the health and growth of those which were left standing. The visits of the manager of the estate had been about four in each year, and on some of such occasions he had resided at the estate two or three weeks at a time. The physician stated, with reference to the personal enjoyment of the lunatic, that he had never been an advocate for the lunatic being taken to *Ormsby*; on the contrary, he had discouraged the idea of his being taken there, for the reasons stated at length in his affidavit; and he further stated, that the lunatic had derived as much pleasure and advantage from the use of the carriage provided for him as he was capable of enjoying; and that the lunatic constantly used it with undiminished

enjoyment, and therefore he had not thought it requisite to recommend that the lunatic should be taken to *Harrogate* or to *Scarborough*, or to any other watering-place, and he had not done so because, in his opinion, it was, under present circumstances, unnecessary. He further stated, that the lunatic was forty-five years of age, and in good bodily health, and that there was no reason why he should not live twenty or thirty years longer.

1849.

In re
BROWN.

Statement.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Follett*, in support of the petition, argued that the committees had neglected their duty towards the lunatic, in not exhibiting more personal care and attention towards him; that, notwithstanding the order made by the *Lord Chancellor*, confirming the Master's report of April, 1842, authorising the visits of the lunatic to *Harrogate* and *Scarborough*, and to *Ormsby*, the lunatic had never paid a single visit to any one of those places, although none of them were more than a moderate distance from *York*; that the large expenditure of money in the erection of the tile-works, and in draining the lunatic's estates, and the salary to the manager, could not be justified, especially as no improvement had thereby arisen in the rental of the estates, and the whole had been effected without the sanction of the *Lord Chancellor*.— [Here the *Lord Chancellor* read the 13th of the Orders in Lunacy, of the 27th of October, 1842.] That an inquiry ought to be made before the Master, touching the accounts and transactions complained of by the Petitioner, and also a scheme directed, as to the future management of the property, and the maintenance of his person; that, where the only person to check the accounts of trustees, as in the present case, was an infant, the Master or the Court always required a guardian to be appointed, to appear on the infant's behalf, on the taking of the accounts, unless there were some adult party present

Argument.

1849.

In re
BROWN.

Argument.

in the same interest as the infant; that, in the present case, the infant Petitioner had never been represented before the Master on the taking of the accounts in the lunacy, until the appointment, in 1846, in the suit, of her mother as her guardian; and that Mr. Wood, the solicitor of the committees, after preparing their accounts in the lunacy, could not justify his appearing and consenting to the passing of those accounts down to the year 1846, on behalf of the infant, on the plea of his being the solicitor of Mrs. Heselton, the mother.

Mr. Roundell Palmer and Mr. Prior, for the Respondents.—The committees of the lunatic presumed, that where no testamentary guardian existed, as in the present case, the mother, being the guardian by nurture and *de facto*, would be the proper person to act, and she was represented before the Master in lunacy on the taking of the accounts and other proceedings, the subject of complaint in this petition, by Mr. Wood, her solicitor; the evidence of the Respondents fully and most satisfactorily explained the cause of the delay in making the infant a ward of Court; the accounts in the lunacy had been passed, during the time that Mr. Wood had a general authority to act for Mrs. Heselton and her infant daughter, who was the sole heiress-at-law, and next of kin of the lunatic; no excursions to Ormsby, or visits to Harrogate or Scarborough had been made by the lunatic, only because the physician in whose care the lunatic had been placed by his father, in the year 1828, had not considered them necessary; and the committees were persons of the highest respectability and integrity, had been appointed by the father of the lunatic as his executors, and the managers of his estates, and had acted in every proceeding connected with the lunatic's estate, with the most perfect *bona fides*, and were in utter ignorance of the necessity of having, in addition to the authority of the Master in lunacy, the sanction of the Lord Chancellor also, for the expenses incurred in the draining of the estates, to

the erection of the tile-works, and to the agreement with the Railway Company for the sale of a portion of the lunatic's estates, required for the completion of the line of railway.

1849.
 In re
 Brown.
 Argument.

Mr. *Bethell* having replied, his Lordship observed, that the case was one of great importance as to general practice, and he would dispose of it very shortly.

The LORD CHANCELLOR, after reading the prayer of the petition, delivered his judgment as follows:—

May 4th.
 Judgment.

The committees, who were also executors and trustees under the will of *William Brown*, were appointed committees of the person and estate, with the knowledge and approbation of *Elizabeth Mary Heselton*, the mother of the heiress-at-law. As against them, nothing is alleged of corrupt conduct or malversation,—nothing whatever, that I can see, is proved against them. On the contrary, there appears to have been an extremely judicious management of the estates. But there does appear to have been great irregularity, for which, however, I am of opinion that they are not responsible at all.

The allegation is, that they are improper persons to be committees of the person and estate, because they do not reside near the estate: that is no objection. They are persons evidently high in the confidence of the family, and all members of the family. They were appointed by the person whom I must suppose to be the mover in this petition, and who describes herself as "*Elizabeth Mary Heselton*, her guardian, appointed by the High Court of Chancery," a very unnecessary description. She, the mover of this petition, was cognisant of the appointment, and, as appears by the proceeding, seems very much to have approved of the

1849.

*In re
Brown.**Judgment.*

individuals. But if they had not been proper persons, am I to discharge committees with costs, thus placing a stigma against them, as if they had been guilty of some great misconduct? And by not residing in the immediate neighbourhood of the estate, am I to suppose that they are not competent to manage the estate? It may or may not be a case for a reference to the Master, as to the propriety of the discharge of committees, one of whom may reside near the estate, and the other not; but it is not a ground *per se* to discharge persons from being committees of the estate.

It is not to be supposed that the committee of an estate is necessarily to be an agriculturist, who knows how to regulate the draining, and all the details of agricultural management of property. The committees employed an experienced person to advise them as to the management of the lands, and they employed a person as a superintendent under that agent. That may or may not be a prudent management of the property; it may perhaps be attended with more expense than is absolutely necessary, but that is not the ground of the application. The ground of the application is some supposed misconduct of these two gentlemen. But I find, on the contrary, as far as I can judge from the affidavits, that a very prudent and discreet management of the property has been observed.

It is, however, quite true the committees had no authority to do what has been actually done; and a large expenditure has been judiciously made, which any proprietor of an estate would have been prudent in making in the improvement of the estate, which has undergone a system of thorough drainage under the inspection of a competent person, and one well conversant with improvements of that nature. The committees had no authority of themselves to do this; but then, I find every step taken by them was with the sanction of the Master. I find, not only by the

fidavits, but by memoranda as to a great part of the transactions, that the Master not only entertained the propositions, but that he actually sanctioned and authorised the persons to carry them out. I cannot, under these circumstances, impute to the committees misconduct, because they were not better acquainted with the rules of this Court as to the management of lunatics' property, than the officer intrusted with the details of that superintendence. It is quite clear, from the beginning to the end, that Mr. Wood, who acted as the solicitor, had the sanction of the Master.

1849.
In re
BROWN.
Judgment.

Another allegation is, that these committees consented to an Act which regulated the mode in which a Railway Company was authorised to take part of this land. That would be a perfectly irregular proceeding: as committees have no power to consent to any such Act. It would be an excess of their authority, which, if they had done it wrongfully, would be misconduct; and if ignorantly, much to be regretted: they ought to be better advised. But I find they acted with the sanction of the Master, who authorised them to consent. How, then, can I blame them, they having previously laid their case before the Master, and obtained his sanction to their giving their assent to that Act of Parliament? The only General Order which I can find upon this point is the 13th Order in Lunacy, of the 27th of October, 1842. [His Lordship here read it.] That provision was introduced, it was supposed, to save the expense of those applications that are quite of course, seeking references to the Master to make certain inquiries that are frequently occurring in the management of lunatics' property. The Master, however, as to jurisdiction in his office, was precisely in the same situation with regard to authority, that he was in anterior to that order. He might make the inquiry, and also a report, without special authority, but that was the extent and the limit of

1849.

In re
BROWN.*Judgment.*

the power which that General Order gave him. When the Master made his report, that report was to be the subject of an order of the Great Seal. But instead of acting on that rule,—(there may be some reason which I am not yet furnished with, but I have nothing at present before me but that 13th Order),—I find that Order has been construed to mean, that the Master may take the whole direction of the lunatic's estate: not only that he may make a report on what he thinks may be done, but direct things to be done, and matters, too, of importance; as, for instance, the giving consent to Acts of Parliament, and establishing an extensive system of drainage, which may be right or may be wrong; but such a step is very important, inasmuch as it is an expensive matter. That is what I find has been done in this case. Am I then, upon this state of facts, and under these circumstances, to treat these committees as persons guilty of default, to discharge them, and to make them pay the costs? So far from thinking that it is a case which calls on me to dismiss the committees with costs, I am clearly of opinion it is my duty to them, and all other persons who may be under the necessity of coming here, to dismiss this petition with costs, so far as it attempts to impeach their conduct.

But then, there are other matters in this petition which do not fall under that rule, and which may be reached by this petition without putting the parties to the expense of any further application. It does appear, in this state of things, that great alteration has been made in the estate, without any authority at all, although I cannot see any ground for supposing that anything has been done with regard to the estate, other than what would have been done by a prudent manager of his own property; but what has been done has been without any authority, and I am totally uninformed, except from certain passages in the affidavits, what will be a prudent and discreet mode of managing the

property in future. It appears to me, therefore, that on this petition it may very well be referred to the Master to approve of a scheme for the future management of the property. Although everything has been very properly done, it has been done on a system of considerable expense: 100*l.* a year is allowed to the manager, and 50*l.* a year to the person immediately superintending the works. Whether that is necessary or not I do not say; but I cannot sanction that course without giving the Master an opportunity of examining in detail what is required for the due management of the property and estate, and that will include what ought to be done with regard to the mansion-house. The mansion-house does not appear to be a very good one, but at the same time it is the mansion-house connected with the property, and is not only unproductive of profit, but appropriated as the occasional residence of the party who is the manager of the estate. This does not appear to be a very prudent course of management. Upon the face of it, (if anything can be better done with the house), the present is not a discreet and prudent mode of making the most of the lunatic's property; and I think that is a matter which is proper to be submitted to the Master's consideration. It may be worth letting. If it should not let, then it may possibly be applied to the comfort of the lunatic. If that be not required, then it may be rightly and properly applied as an occasional residence for the manager of the property. All that is matter of investigation and inquiry, and I have no facts before me to enable me to come to a satisfactory conclusion on the subject. It ought, therefore, to be referred to the Master, to approve of a scheme for the management of the estate, and what course it is best to adopt as regards the mansion-house.

1849.

In re
Brown.

Judgment.

Then, as to the lunatic, I cannot determine, on the facts before me, what ought now to be done. I cannot think that the mode in which the lunatic has been dealt with is

1849.

In re
BROWN.*Judgment.*

quite right. I find he is possessed of a certain degree of reason and intelligence, so as to render him capable of enjoying an occasional visit at *Scarborough*, or at his own house; implying, therefore, that his mind is not actually gone, but that he has some capacity for enjoyment. I find him kept at a lunatic asylum. Now, he may be kept there, probably, with all the comforts which his situation may make him capable of enjoying; but when there is income enough to afford another scheme for the care of a lunatic, it is, undoubtedly, right to have such other scheme brought forward, and that scheme will be the most desirable, which would afford him the utmost degree of pleasure and comfort which his unfortunate situation enables him to enjoy. I think, therefore, there should be an inquiry as to a scheme for the future care and comfort of the individual.

Now, with regard to the accounts, which is the only other part of the case that I think it necessary to observe on, if this money had been expended without any sanction, I should have done in this case what I have so frequently done in others: I should have referred it to the Master, to inquire whether the expenditure had been beneficial or not to the lunatic's estate, or had been such as the Court would sanction if it had been previously applied to; and even if it turned out that it was beneficial, still those who had improperly expended it, and thereby occasioned the necessity of this subsequent inquiry, would have had to pay the costs of it; but how can I pursue that course, when I find the expenditure has been all made with the concurrence of the Master, and that nothing has occurred to induce the parties to suppose they were guilty of any irregularity.

One irregularity complained of is such as I cannot deal with in any shape. Here is an heiress-at-law, an infant; she is without any legal guardian or testament-

ry guardian. The father died, leaving her with her mother, under whose care she has been, and with whom she has always resided; and the mother employs her own solicitor to manage her own affairs; and, with the concurrence and knowledge of the mother, the solicitor appears in the lunacy as the solicitor of the heiress-at-law. Then it is supposed that all that is to go for nothing, because there existed no testamentary guardian—no legal guardian. That seems to assume that the next of kin are to come here to protect their own interest, and no person, no legal guardian, is to protect the interest of the heiress-at-law and next of kin: that is not the reason why the next of kin or the heiress-at-law are required to appear. The Court requires the heiress-at-law to be in attendance to furnish information to the Court, to enable it the better to attend to and to protect the interests of the lunatic. If I were to lay down a rule, that no infant heir-at-law should be brought here without a testamentary guardian, or a legal guardian being appointed by the Court of Chancery, the next question would be, who is to pay the costs of that attendance? Not the lunatic's estate. That would be anything but beneficial to the lunatic's estate. I cannot call on the infant, or those in the interest of the infant, to bear the expense of procuring the appointment of a guardian (if not required for other purposes), merely to enable the infant to appear as heir-at-law of the lunatic. I asked what authority there was, or what means there would be, for procuring the attendance of the infant heir, when the infant heir had no legal guardian appointed? I received no answer to that question. It is true, that when an infant is sued in this Court, the Court has the means of adopting a course of appointing some person to protect the interest of the infant; but there is no such process for the heiress-at-law in lunacy. Whatever may be the rule, when the case occurs, the question here is, whether the heiress-at-law, having by her mother's attorney regularly

1849.

In re
BROWN.

Judgment.

1849.

In re
*Brown.**Judgment.*

appeared before the Master, all these proceedings are to be treated as void, because the heiress-at-law, an infant, had not a regular guardian appointed, or any person strictly authorised to act for her. In matters of lunacy, as this case stands, I cannot consider it as a nullity, and treat it as any offence in the solicitor acting under the authority of the mother, or as a reason for putting aside all the intermediate proceedings; which I am asked to do, not on the ground that nobody appeared for the heiress-at-law, or that the heiress-at-law did not, in fact, attend the Master, but because, so attending, there was no testamentary guardian, or guardian appointed by this Court, legally to look after the infant's interests. There, it is said, the income is not what might be expected. That has been explained. That increase has not been produced, because it has been, under the authority of the Master, expended in improving the property. Nobody who lays out money in improving his property, and subjecting his estate to a system of drainage, will find much increased income in two or three years. He will expend more than the income on the estate: while that is going on, it is expensive; but it is very productive and very lucrative in subsequent years. Beyond all doubt, it will exhaust the income of the estate, for some time at least. There is no fraud imputed,—no improper items pointed out. If there had been any improper items or fraud in these accounts, there would exist a good reason for a special reference to the Master to inquire into them; but, as I understand the matter, there is here only a mere general inference drawn from the supposed misconduct of those who have the management of the estate, before the Master. Even if there were any improper items pointed out, I should be very reluctant to open the accounts upon any accidental errors in taking those accounts, in the absence of actual fraud, on a petition founded on allegations of gross misconduct, and fraud, and malversa-

tion, imputed to those who are personally responsible for such misconduct, and whose characters are impeached without any ground shewn for it, as far as I can find, in the management of the property. It is quite open to the parties, if there are corrections to be made in the accounts, to bring such a case forward as a ground for further inquiry, and correction, if necessary; but, on the present petition, connected as it is with the case which charges gross misconduct in the committees, and complaining of the accounts merely as consequential on such alleged misconduct, even if there had been facts much stronger than there are, it would have been impossible for me to open the accounts in the mode proposed.

1849.
In re
BROWN.
Judgment.

Therefore, without precluding the parties from bringing forward any case which the circumstances may justify, as to any particular items in the accounts, I do not think it is expedient or proper, on this petition, to make any such order as that which is asked.

The order I shall make is to dismiss the petition with costs, so far as it impeaches the conduct of the trustees and prays for their discharge, and to direct a reference to the Master to inquire as to a proper scheme for the future management of the property of the lunatic, and the mode in which the mansion-house should be dealt with; and also as to a scheme for the future maintenance and management of the person of the lunatic.

1849.

May 5th &
8th.THE LONDON AND NORTH WESTERN RAILWAY
COMPANY v. SMITH.

A Railway Company having by the construction of their line of railway permanently stopped up the passage through a street in a populous town, the owner of certain houses, manufactures, and other buildings situate in that street, not directly affected by the railway works, and at a distance of 126 feet from the boundary line of the railway, gave notice in writing to the Company, under the 68th section of the Lands Clauses Consolidation Act, 1845, claiming a sum of money as

compensation, in respect of his property being "*injuriously affected*" by the permanent stoppage of the street, and requiring the Company, in case they declined to pay that sum, to summon a sheriff's jury to assess the damages sustained by him:—*Held*, on bill filed by the Company, to restrain the owner of the houses, &c., from proceeding upon the notice, and from taking any other proceeding to recover the sum claimed by him, that it was a proper case for an injunction; and directions were given by the Court, that the owner of the houses, &c., should bring his action at law, to try his right in the first instance, notwithstanding the 68th section of the Lands Clauses Consolidation Act, which confers on the owner of houses &c., the right to have his claim at once settled by a sheriff's jury, after notice in writing has been given by him to the Company; and the Court gave liberty to either party to apply, after the trial of the action, the parties undertaking to use the judgment under the direction of the Court.

BY an Act of Parliament of the 9 & 10 Vict. c. ccclix, being "An Act for making a Railway from the *London and Birmingham Railway* to or near to *Navigation-street*, within the Borough of *Birmingham*," it was (amongst other things) enacted, "that it should be lawful for the London and Birmingham Railway Company to make a railway from their then present line to or near a street called *Navigation-street*; but before the Company should proceed to stop up the passage along a road called *Bartholomew-street*, they should, to the satisfaction of the Commissioners of the *Birmingham-street* Act, lay out a good road instead of that road, which should afterwards become a public highway." By an Act passed previous, but in the same year as the last-mentioned Act, 9 & 10 Vict. c. cciv, the London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies were consolidated by the title of "The London and North Western Railway Company." With the former Act the Lands Clauses Consolidation Act, 1845, was incorporated, and by the 68th section (a) of that

(a) By which it is enacted, "That if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the exe-

cution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act or any Act incorporated therewith, and if the compensation

provision was made for compensation to parties in re-
of any lands *injuriously affected* by the works of the
any.

1 in such case shall exceed
n of 50*l.*, such party may
e same settled, either by
tion or by the verdict of a
he shall think fit; and if
rty desire to have the same
by arbitration, it shall be
for him to give notice in
to the promoters of the un-
g of such his desire, stat-
such notice the nature of
rest in such lands in re-
which he claims compen-
and the amount of the
ation so claimed therein;
eas the promoters of the
king be willing to pay the
of compensation so claim-
shall enter into a written
nt for that purpose, with-
y-one days after the receipt
ich notice, from any party
ed, the same shall be set-
arbitration, in the manner
rovided; or if the party so
as aforesaid, desire to have
stion of compensation set-
jury, it shall be lawful for
give notice in writing of
desire, to the promoters
ndertaking, stating such
rsas aforesaid; and unless
oters of the undertaking
g to pay the amount of
ation so claimed, and en-
a written agreement for
pose, they shall, within
me days after the receipt
otice, issue their warrant
eriff to summon a jury for

settling the same in the manner
herein provided; and in default
thereof, they shall be liable to pay
to the party so entitled as afore-
said, the amount of compensation
so claimed, and the same may be
recovered by him, with costs, by ac-
tion in any of the superior courts.”
And by the 6th section of the Rail-
ways Clauses Consolidation Act,
1845, it was enacted, as follows, viz.
that “in exercising the power given
to the Company by the special Act
to construct the railway, and to
take lands for that purpose, the
Company shall be subject to the
provisions and restrictions con-
tained in this Act, and in the said
Lands Clauses Consolidation Act,
and the Company shall make to the
owners and occupiers of, and all
other parties interested in any lands
taken or used for the purposes of
the railway, or injuriously affected
by the construction thereof, full
compensation for the value of the
lands so taken or used, and for all
damage sustained by such owners,
occupiers, and other parties, by rea-
son of the exercise, as regards such
lands, of the powers by this or the
special Act, or any Act incorporated
therewith vested in the Company;
and except where otherwise pro-
vided by this or the special Act,
the amount of such compensation
shall be ascertained and deter-
mined, in the manner provided by
the said Lands Clauses Consolida-
tion Act, for determining questions

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY CO.

v.

SMITH.

Statement.

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY CO.

v.
SMITH.

—
Statement.

Before the Company proceeded permanently and by a solid embankment to stop up the passage along and to divert *Bartholomew-street*, they laid out a good and sufficient road, which was afterwards opened to the public, and which was carried considerably out of the direct line, and by the side of the new branch of railway, into a street called *New Canal-street*. The Defendant *Smith*, against whom the bill was filed by the Company, was interested in certain dwelling-houses, warehouses, manufactories, and erections situated in *Bartholomew-street*, the north corner of which was at a distance of 126 feet from the nearest point of boundary line on the south side of the railway, and his complaint was that his property had decreased materially in value by reason of the construction of the railway. On the 1st of March, 1849, *Smith* served the Company with a notice requiring them to pay him 2000*l.* as compensation for damages or loss then sustained or thereafter to be sustained by him, in respect of his interest in the houses and erections in *Bartholomew-street*, or to summon a jury under the 68th section of the Lands Clauses Consolidation Act; upon which the Company filed their bill against the Defendant, seeking a declaration that he was not entitled to any compensation in respect of the houses, &c. belonging to him, and that, if necessary, an issue might be directed to try whether the houses and premises of the Defendant had been *injuriously affected* by the construction of the railway and works, and that the Defendant might be restrained from taking any proceedings against the Plaintiffs under the notice of the 1st March, 1849, and from taking any proceedings at law against the Plaintiffs to recover the sum of 2000*l.* so claimed by the Defendant. No part of the Defendant's pre-

of compensation, with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned

Act, shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

mises was numbered on the plans deposited and referred to in the first-mentioned Act, or was mentioned in the book of reference. The bill (amongst other things) charged, that no injury whatever had been done by the construction of the railway and works to any part of the Defendant's premises, or to any right or easement appurtenant thereto, and that, if the Plaintiffs were to issue their warrant to the sheriff to summon a jury for settling the amount of the compensation claimed by the said Defendant, as required by the said notice, they would thereby admit that the Defendant was entitled to some compensation in respect of the premises; that a jury, if summoned for the purposes aforesaid, under or by virtue of the provisions in the Lands Clauses Consolidation Act, 1845, would have no jurisdiction, power, or authority to determine or entertain the question whether the Defendant was or was not entitled to any compensation in respect of the premises; that the Plaintiffs were advised that if they should make default in issuing their warrant to summon a jury for settling the amount of compensation claimed by the Defendant, within twenty-one days after the receipt by them of the notice, the Defendant might recover the full amount of compensation claimed by him, with costs, by action in any of the superior courts, and that there was no provision in any or either of the several thereinbefore stated Acts of Parliament, or in any Act of Parliament incorporated therewith, under or by virtue of which it could be determined whether the Defendant was or was not entitled to any compensation, and such question could not be determined without the aid and assistance of the Court.

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY Co.

v.
SMITH.

—
Statement.

The affidavits filed on both sides had reference principally to the question of damage or injury sustained by the Defendant by means of the stoppage of the thoroughfare along *Bartholomew-street*, by the construction of the line of railway across it. The *Vice Chancellor of England*, on the

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY Co.
v.
SMITH.

Statement.

26th of April last, on application by the Plaintiffs for an injunction against the Defendant in the terms of the prayer of the bill, declined to make the order, and the Company now renewed the application before the *Lord Chancellor* by way of appeal.

The LORD CHANCELLOR having in the course of the argument determined, that the construction to be given to the words *injuriously affected*, contained in the Lands and Railways Clauses Consolidation Acts of 1845, must be decided by a Court of law, no observations of counsel on that point are adverted to.

Argument.

Mr. *Bethell* and Mr. *Speed*, in support of the appeal motion.—According to the 68th section of the Lands Clauses Consolidation Act, 1845, as charged by the bill, if the Plaintiffs fail to summon a jury for settling the amount of compensation claimed by the Defendant within the time limited by that section, the Defendant may recover the whole amount of compensation claimed, with costs; and if the Plaintiffs do summon a jury under that section, the jury would have no jurisdiction to entertain the question, whether the Defendant was or not entitled to any compensation. In the case of *The London and South Western Railway Company v. Coward* (a), the question was, whether the parties had such an interest in the premises (a large starch manufactory in *Lambeth*), as entitled them to compensation against the Company. The case of *The Queen v. The Lancaster and Preston Junction Railway Company* (b) is supposed to disagree with the judgment of this Court in the case of *The London and South Western Railway Com-*

(a) See *post*, p. 377.

(b) 6 Q. B. Rep. 759.

v. Coward; but that is not the fact, because, in the case, the right to compensation was not in issue.

THE LORD CHANCELLOR.—What do you consider to be the defendant's proper course of proceeding here?]

The Defendant might bring his action against the Plaintiff in which the Company would admit the receipt of notice in writing, and that the Defendant had claimed a particular sum of money as compensation, in respect of property having been injuriously affected by the Company's works.

Malins, Mr. Metcalfe, and Mr. Phipson, for the Defendant.—The course pursued by the Defendant is the proper one, whereby to ascertain the amount of damage sustained by him; and the mere fact of summoning a jury is not to be an admission on the part of the Company of any damage or injury done by them.

THE LORD CHANCELLOR.—Suppose you succeed before a sheriff's jury in obtaining damages, what is the next proceeding?]

The Defendant must then establish his right by action.

THE LORD CHANCELLOR.—The mode of proceeding you now put forward seems an inconvenient one.]

For many years past the course of proceeding has been to summon a jury.

THE LORD CHANCELLOR.—But if the Company neglect to summon a sheriff's jury, then they will be liable to the full amount of damages claimed against them by the defendant.]

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY Co.
v.
SMITH.

Argument.

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY Co.

v.
SMITH.

—
Argument.

Mr. *Bethell* here referred to the 50th section of the Land Clauses Consolidation Act, by which a judgment is made a matter of record whereon execution may issue.

Mr. *Malins*.—The effect of a judgment consequent on the finding of damages by the sheriff's jury, is, that you cannot issue execution on it, but must proceed to make it effective by action, in the same manner as on a foreign judgment.

[The LORD CHANCELLOR.—The question is, whether I have jurisdiction in cases like the present; and if so, whether I ought to permit such a course as you state to be pursued. Is not the question one for a Court of law? If so, I am willing to put the matter in a due course for consideration. The Defendant might bring his action, and the Company will defend themselves on the ground of no damage having been sustained by the Plaintiff in the action.]

In *Pim v. Wilson* (a), this Court declined to interfere with a legal remedy; and if the Company in the present case do only what is authorised by the Act, no action can be sustained against them: *Thicknesse v. The Lancaster Canal Company* (b). If the Defendant in the present case had in the first instance brought his action at law against the Company, it would have been immediately objected to him, that he was bound to have proceeded in the mode prescribed by the Act. Before the passing of the Land Clauses Consolidation Act, the only course by which the owner of property could compel a Company to summon a jury, was by the process of mandamus, through the medium of an application to the Court of Queen's Bench; but that being a tedious and unsatisfactory proceeding, the 68th section of the Land Clauses

(a) 2 Ph. 653.

(b) 4 M. & W. 472.

Consolidation Act was substituted for it, and ought to be followed in the present case.

[The other cases cited for the Defendant were *The Queen v. The Eastern Counties Railway Company*(a), and *Boulton v. Crowther* (b).]

1849.
THE LONDON
AND NORTH
WESTERN
RAILWAY CO.
v.
SMITH.
—
Argument.

Mr. *Bethell* was not heard in reply.

The LORD CHANCELLOR :—

It would have been a very inconvenient thing for those whose duty it is to administer equity in this Court, no doubt, when these questions first arose, to repudiate the jurisdiction, and to leave the parties to fight it out as they might, by legal proceedings; but the Court thought proper to exercise what was a very wise jurisdiction, and which was clearly within its power, inasmuch as the interests of the public required the Court to assume a jurisdiction over the parties interested under these various Acts, so as to keep the one side and the other within the powers which the Acts gave them. This has been done extensively against Railway Companies, and it must be right to do so against those who are opposed to these Companies; it must be an even-handed justice, and the same rights which apply to the one must apply to the other. In these cases the Act of Parliament confers certain rights, and of all the rights that an Act can give, there is hardly one more stringent than that which is given to the party complaining of damage in these cases, and the provision is a most extraordinary one. I do not say that it is wrong—it is the law, and must be obeyed; but to say, with respect to a

Judgment.

(a) 2 Q. B. Rep. 347.

(b) 2 B. & C. 703.

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY Co.

v.
SMITH.

—
Judgment.

Company against whom a perfectly unjust claim is made, where the party has no shadow of title at all, when he asks for a large sum of money by way of compensation for an injurious damage against the Company—that the effect is to be this, viz. that if the Company do not, within twenty-one days, take measures to go before the sheriff's jury, they are to be fixed with the whole sum claimed, repayment of which cannot afterwards be obtained—that is as severe an enactment as a Company can well be subjected to; and how are they to escape? Their only way is to go before a sheriff's jury, and to incur all the expense of having the damages assessed for an injury which may not really exist; and all this is to take place when, in point of fact, the Company may be certain, that, whatever the jury assess the damages at, the party making the claim has no right to receive them. Then, this course having been pursued—according to the construction put on the Act by the Defendant's counsel, (which I do not think it necessary to question—it may be perfectly right, but it does not enter into my view of the case one way or the other) the next step is, that there is an action to be commenced by the party who has obtained the verdict of the sheriff's jury for a large sum of money, which the Company contend is not due or payable at all; and then, after all these proceedings have been had, the Company may discover that they are right, and that the party making the claim is in the wrong; and if he cannot shew that he is entitled to this compensation, then he will, of course, fail in his action, and there will be an end of the contest. But two proceedings will have taken place—the inquiry before the sheriff's jury, and the action.

I do not know whether any compensation is recoverable for the costs and expenses of that proceeding, under the Act; but it is no small grievance to any Company or individual, to be dragged through a litigation which must end

nothing beyond merely ascertaining the amount of damage, without any inquiry being first made whether any damage is due in respect of that damage. That provision appears to have been introduced into the later Acts, for the purpose of avoiding a mandamus. They who introduced that provision for that purpose, could not have been aware of the consequence of what they were doing. Previously to that provision, when a Company could only be compelled to go before a sheriff by a mandamus, the Court opened the door, first decided the right, because, on the application for a mandamus, whatever actual damage might be sustained, the Court of Queen's Bench had an opportunity of seeing whether, independently of the question of damage, there had been injury done to the party seeking the mandamus, whether the party under the Act was entitled to compensation for the damages that he had sustained. The law before, provided the remedy, and provided the means by which the question of right might be decided, before the question of the amount of damage was investigated.

stood the law. Then comes an Act of Parliament which, for the purpose of correcting that supposed evil, creates a much greater one, by depriving the Company of the means of ascertaining the question of right before they go to the sheriff's jury to assess the amount of compensation. That circumstance alone, if it were not within the natural jurisdiction of the Court, would be quite sufficient to justify the interposition of this Court, because it would be just to permit a party to be involved in that sort of litigation, without first ascertaining whether the right claimed existed as between the party and the Company against whom the claim is made. The only remedy for that is an equity which applies in all cases to the party who is sought to be affected—and so grievously affected that it is said he would be by the provisions of the late Act—entitles him to come here for an injunction. On what

1849.
 THE LONDON
 AND NORTH
 WESTERN
 RAILWAY CO.
 v.
 SMITH.
 Judgment.

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY CO.

v.
SMITH.

—
Judgment.

ground? The ground is, that the claimant is putting in force the strong powers given by the Act of Parliament against a Company, whereas those powers are given only to certain persons, and the claimant is not one of them; his case does not fall within the description of the parties who are entitled to exercise those powers. If the Company exceed their powers, the party affected by that excess comes here to confine the Company to their powers. But here the power is exercised by the individual complaining against the Company, and the Company, therefore, comes here and makes the complaint; and the Court, on a motion for an injunction, is to see whether the party so complaining is entitled to exercise the power given by the Act. That is the whole equity, and it is equity enough on that question. The Court must see and ascertain how the relative rights and liabilities of the parties exist; but it is met at once by a legal question:—Here is a party placed in the peculiar situation of having houses very likely to be more or less affected by the works of the Company. The works, however, are directly authorised to be done by the Act of Parliament, but they may or may not produce what may be called damage to the individual occupying the house. If the Company be liable to him, it is obvious that the Company are liable to all his neighbours; but the difference between the injury to one house and another, in that street, must be very small, and must be difficult to ascertain, when a case arises in which the owner of one house may be entitled to compensation, and the owner of the next house not. It is important to decide the general question, which it is quite clear is a question of law, and a question which this Court ought not to decide. The Court must either refuse to interfere, which would not be just; or, in order to interfere with propriety, it must know what the right is,—it will put the parties in the same situation, coming here for an injunction, as they would have been in, if, instead of making such an ap-

plication here, they had applied to the Court of Queen's Bench for a mandamus, in order, first of all, to ascertain what the right is. We must see what is the most convenient course of ascertaining that right. There are two modes of doing it: one is open to the great inconvenience of ascertaining the amount of damage before inquiring into the right, when it may turn out that no right exists in the Plaintiff, and that proceeding may therefore be useless: the other mode is, to do that which must, at all events, be done, namely, there must be an action so framed as to raise the question of right, and obtain a decision on that question. If, in that action, the party claiming fails to establish a right, one proceeding is sufficient, and the question of the amount of damage becomes immaterial. In the other mode, there would be the inconvenience of two proceedings, and the result may be, that the assessment of damages may be perfectly useless, if the Plaintiff fail to establish his right. Now, which is the most convenient course? Of necessity, the action to try the right must be proceeded with. Is it not more convenient to have the right established first, than to proceed to ascertain the amount of damages first, which may become entirely useless? To have the title tried first, which must be tried, occurs to me to be the most simple proposition, and to come entirely within the jurisdiction which this Court has so long exercised, in order that the parties may really know how they stand towards one another. My opinion is that which I have already expressed, namely, that the most convenient mode of trying the question is, for an action to be brought by the Defendant against the Company, the Company admitting (adhering to the terms of the Act) that they were served with a demand for compensation, under the provisions of the Act, and that the Company suffered twenty-one days to elapse before they proceeded to summon a jury. That will bring before a Court of law all that it requires, in order to ascertain the right of the Plaintiff. If he succeed, then no injury

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY Co.
v.
SMITH.

Judgment.

1849.

THE LONDON
AND NORTH
WESTERN
RAILWAY CO.

v.
SMITH.

—
Judgment.

will be done, except this, of having the action tried first, and assessing the damages afterwards; and such, I think, ought to be the order; and the *Vice-Chancellor*, I must say, does not appear to me to have had any difficulty about the matter, except this, that he conceived the proceedings before the sheriff's jury would answer all the purposes. It is not now contended before me, that that would be so. The counsel on both sides agree that there must be another proceeding, after assessing the damages before the sheriff, in order to try the question of right; and that seems to me to be the difficulty that led to the *Vice-Chancellor's* order. It being clear to me that that is not so, I do not think that there is any difference of opinion between myself and the *Vice-Chancellor* on the real question as to the necessity of trying the right before assessing the damages.

Mr. *Bethell* then stated, that in the decision of the *Vice-Chancellor* in the case of *The London and South Western Railway Company v. Coward*, there was a perfect identity of opinion with his Lordship, because his Honor, in that case, placed his judgment on the very point on which his Lordship had disposed of the present case; and he suggested the following as the proper form of the order to be made on the motion, which was assented to by his Lordship, viz.—Discharge the *Vice-Chancellor's* order—Let the injunction issue as prayed—Let the Defendant be at liberty to bring an action against the Company, and let the Company in such action admit that the Defendant has given notice in writing to the Company, and has, in and by such notice, stated the nature of his interest in the land in question, and has claimed 100*l.* as compensation in respect of such land being injuriously affected by the execution of the works of the Company, and also desires to have the same settled by a jury; and also admit that the Company did not, within

twenty-one days after receipt of such notice, issue their warrant to the sheriff, to summon a jury for settling such compensation; and after the trial of such action, let either party be at liberty to apply—the parties undertaking to use the judgment under the direction of the Court.

1849.
THE LONDON
AND NORTH
WESTERN
RAILWAY Co.
v.
SMITH.
Judgment.

THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY v.
COWARD.

1848.
July 19th.

A MOTION was made before the *Vice-Chancellor of England* to dissolve an injunction which had been granted in this case, to restrain the Defendants from bringing any action at law against the Company to recover the amount of compensation which they claimed, they having served notice upon the Company to summon a jury to assess the amount, and the Company insisting that they had no claim to any compensation: His Honor delivered judgment to the following effect:—

The VICE-CHANCELLOR:—

My opinion is, that I must continue the injunction. The case really appears to me to be beset with difficulty. Messrs. *Coward & Co.* were in possession of the manufactory in question under a lease, which expired 24th June, 1847; and in the months of October and November, certain notices were given by the South-Western Railway Company to the owners of the freehold, that the Company would take some of the land upon which a part of the manufactory stood; then, instead of proceeding directly to take possession, and acquiring possession, during the existence of the lease, for certain reasons the matter stood over, and there is, actually, no possession taken until the month of May in this year. In the meantime, the lease had expired; but there was a dealing going on between the South-Western Railway Company and those who represented the inheritance in fee simple of the land in question, subject to the lease; and that gave rise to the execution, such as it was, on the 3rd of August, 1847, of an agreement. I am not called upon to say exactly what is the true construction of it, but under that instrument it is perfectly evident that the Company acquired their right as against the reversioners, to some extent, in the land in question.

Then, it appears that, prior to the execution of the lease, a negotiation had been going on, as to what should be done in respect of what was shortly to happen, namely, the expiration of the lease on the 24th of June.

Different letters, and so on, passed between Messrs. *Webb*, who represented the owners of the inheritance, and Mr. *Roberts*, who represented

1848.

THE LONDON
AND SOUTH
WESTERN
RAILWAY CO.

v.
COWARD.

—
Judgment.

the lessees; and there was an agreement made between those parties, on the 3rd January, 1848.

Now, I think it will probably appear, when the matter comes to be investigated, that that agreement of the 3rd January, 1848, cannot be considered as a thing which of itself is to stand as against the Company; but that such interest as the Company acquired under the agreement of the 3rd of August, 1847, will give them a right to say how far that agreement of January, 1848, shall be carried into effect.

And then the Company took possession; and there was a species of proceeding, as I understand it, with reference, not to the value at the time when the Company took possession, but with respect to the value at an anterior time, when the lease was subsisting, and under which, for the purposes of the 85th sect. money had been paid into Court, and a bond given according to that section.

Now, matters being in this state, and the fact being, as I understand it, that the uncertainty and delay, in a great degree, were attributable to some proceedings that were taken by way of mandamus, to compel the Company to have a jury summoned, and they having at last terminated, the parties are placed in a very awkward position, if they are to be incumbered with all the difficulties which have been produced by the negotiation with the reversioners, and by the agreement with the tenant. It appears to me that there is, to say the least of it, some uncertainty as to what is the precise interest which the tenant has, and it, perhaps, admits of some doubt, what is the precise extent of the interest which the Company has; but the tenant has been advised to issue a notice for the purpose of obtaining a determination what ought to be the compensation made to him in respect of the damage done to his interest; and also to give another notice for the purpose of ascertaining what should be the apportionment of the rent.

Now, it has struck me all along, that it would be an extremely improper thing to allow those notices to go before a jury, and to be treated by a jury, when it appears to me, in the first instance, that, if necessary, a Court of equity itself will determine what is the interest of the Company, and what is the interest which the tenant is entitled to have, and what is the rent that ought properly to be paid.

And if I were to dissolve the injunction, the very case which, as I understand it, the bill seeks to have decided by the Court, will be thrown in a sort of huddled manner before a jury; and I have no reason to suppose the case would be properly treated before a jury.

It seems to me, therefore, that it is absolutely necessary, if the tenant have the right which he claimed by virtue of the two notices,

That the quantity of equitable interest which he has as tenant, and the quantity of rent which is actually payable, should, in the first instance, be determined, in order, that then, if he have liberty so to do, he may proceed either upon the notices already given, or such notices of a similar nature as may hereafter be given.

I cannot but think, in the present state of things, that it would be quite wrong to dissolve the injunction.

The case was afterwards carried to the *Lord Chancellor*, who refused to discharge the injunction.

1848.
THE LONDON
AND SOUTH
WESTERN
RAILWAY CO.
v.
COWARD.
Judgment.

UNDERWOOD v. JEE.

1849.
Nov. 2nd.

THIS was a creditors' suit for the administration of the estate of *John Jee*, who died intestate, in September, 1847.

The bill was filed on the 11th of December, 1848, against his widow, who was also his administratrix. In addition to the usual allegations and charges, it alleged, that the Defendant had kept possession of her late husband's stock in trade and effects, and had continued to carry on his business therewith, and had applied the profits to her own use. It prayed for an account of the intestate's debts and personal estate and effects, and of the gains and profits made by the Defendant in carrying on the business; and that the Defendant might be restrained, by injunction, from continuing to carry on the business; and that a receiver might be appointed.

Two creditors' suits were instituted for the administration of the same estate, one of which asked for an account of the profits made by the personal representative of the debtor in carrying on the business after his death. In the other suit, a decree had been obtained for taking the ordinary accounts only. A motion to stay proceedings in the first suit was refused.

The Defendant, by her answer, admitted that she had carried on the trade with effects belonging to the intestate's estate, but denied that she had applied any part of the profits for her own use, except for the purpose of maintaining herself and her child.

On the 27th of December, 1848, another creditors' bill,

1849.

UNDERWOOD

v.
JEE.

Statement.

Smith v. Jee, was filed, to which an answer was shortly afterwards put in, and a decree was obtained on the 24th of February, 1849. By that decree the Master was directed to take an account of the debts due to the creditors of the intestate, and of his personal estate come to the hands of the Defendant as his administratrix, and of his outstanding personal estate; and if the personal estate should be found insufficient for the payment of all his debts, then the Master was to inquire what real estate he was entitled to.

On the 27th of March, 1849, a motion was made by the Defendant, in the cause of *Underwood v. Jee*, that all further proceedings in that cause should be stayed. It was heard before the *Vice-Chancellor of England*, who refused it, with costs.

In the following month of April, an order was obtained in the second suit, upon a petition, referring it to the Master, to inquire whether it was desirable that the business should be continued for the benefit of the intestate's estate; and the Master having subsequently reported in favour of such a proceeding, the decree was ordered to be amended in that respect; and the Defendant was to account before the Master for the profits which should be made by her from the business.

The Defendant now renewed the application before the *Lord Chancellor*, for the stay of all proceedings in the suit of *Underwood v. Jee*, asking, at the same time, that the *Vice-Chancellor's* order of the 27th of March, 1849, might be discharged.

Argument.

Mr. *Rolt* and Mr. *Miller*, in support of the motion.—No benefit is likely to arise from the prosecution of the second

suit. Since the decree, the Defendant has been required, by the order made on petition, to account for the profits arising from carrying on the business; and, if it was thought desirable, liberty might now be granted to the Plaintiff in the second suit, to charge the administratrix, before the Master, with the profits arising from the business since the death of the testator. An order of that description was made in *Dryden v. Foster* (a). That would meet all the purposes which the second suit could possibly effect.

1849.
 UNDERWOOD
 v.
 JEE.
 Argument.

Mr. James Parker and Mr. Simons, contra.—The object of this motion is stated in the notice to be merely to stay the proceedings; and the Court cannot, upon such an application, make a variation in the decree which has been already pronounced in the other suit. Under the existing decree, the Defendant is not called upon to account for the profits made by her in the interval between the death of the testator and the order which was made on the petition. The present suit asks for a material addition to the relief which has already been obtained, and therefore the Court will not prevent it from being prosecuted: *Rigby v. Strangways* (b).

Mr. Rolt replied.

The LORD CHANCELLOR:—

On the case made before the *Vice-Chancellor*, I think his order was right; because he had before him a suit in which there was a mere ordinary decree to administer the estate, without any special case as to carrying on the trade, and without any prayer for relief, in that respect,

Judgment.

(a) 6 Beav. 146.

(b) 2 Ph. 175.

1849.
—
UNDERWOOD
v.
JEE.
—
Judgment.

against the personal representative by whom the trade was carried on. He refused the application; for the common ground, that the existing decree would answer all purposes, did not apply to this case. The question is, was that order erroneous? Taking the decree, and the subsequent order together, do they provide for all which the creditor, who is Plaintiff in the first suit, can obtain? The order on petition is merely prospective. The administratrix has the authority of the Court for carrying on the business from that time; and the personal representative is accountable for the future profits of the business carried on. That was not prayed by the bill in which the decree was obtained. If the personal representative, without any authority, carried on the trade, before the order on the petition, and either lost some part of the assets, or made any profits, that is not included in the decree or the subsequent order. There is consequently an object in this suit beyond that which is provided for by the existing decree.

Under these circumstances, I shall allow the Plaintiff to go on with this suit, which he will of course do at his own risk; and, when the cause comes on to a hearing, the Court will give him the relief to which he is entitled, or make him pay the costs of the litigation, if it should be found to have been unnecessary.

1849.

SAINTER v. FERGUSON.

Nov. 5th.

THIS was a motion, on behalf of the Defendant, seeking the discharge of an order of Vice-Chancellor *Knight Bruce*, dated the 13th of June last, whereby the Defendant was enjoined from practising as a surgeon or apothecary, at *Macclesfield*, or within seven miles thereof, until the hearing of the cause, or the further order of the Court. The Defendant, on the 12th April, 1848, entered into an agreement in writing, of that date, with the Plaintiff, by which, in consideration of the Plaintiff engaging the Defendant as an assistant to him, as a surgeon and apothecary, the Defendant promised the Plaintiff that he would not at any time practise as a surgeon or apothecary, at *Macclesfield*, or within seven miles thereof, under a penalty of 500*l*. The Defendant, in August, 1848, was discharged by the Plaintiff from his service, and thereupon he commenced practising, in the town of *Macclesfield*, as a surgeon and apothecary. The Plaintiff filed his bill in the month of September, 1848, seeking an injunction to restrain him from so practising; and on motion before the Vice-Chancellor *Knight Bruce*, on the 22nd of that month, for an injunction against the Defendant, his Honor ordered the same to stand over, with liberty for the Plaintiff to bring such action against the Defendant, as he should be advised. The action was accordingly commenced by the Plaintiff against the Defendant, and he at the trial thereof recovered a verdict for 500*l*. and costs, for which judgment was duly entered up by the Plaintiff. Subsequently, a fiat in bankruptcy issued against the Defendant, and thereon the Plaintiff proved for the amount of the costs of the action; and on the motion being renewed before Vice-Chancellor

A., in consideration of B. engaging him as his assistant in the business of an apothecary, at a stated salary, agreed, in writing with B., not to practise as an apothecary within seven miles of the town of M., under a penalty of 500*l*. A., having been discharged by B. from his service, proceeded to practise as an apothecary in the town of M.; whereupon B. moved for an injunction to restrain A. from so practising; but the motion was ordered by the Court to stand over, with liberty for B. to bring an action. In the action B. recovered 500*l*. damages and the costs against A., and entered up judgment for the same, and afterwards proved under a fiat in bankruptcy issued against A. for the amount of the costs, but not for the damages:—*Held*,

that an injunction granted against A. on a renewed motion could not be maintained, and that B. was not entitled to any equitable right arising out of the legal contract entered into between the parties.—*Held*, also, that the Court had no power to set off the costs recovered at law by B. in the action against the costs given to A. on the renewed motion for the injunction.

1849.
 SAINTER
 v.
 FERGUSON.

Statement.

Knight Bruce, he was pleased to make an order, granting the injunction as sought by the bill. The present was an appeal by the Defendant from that order.

Argument.

Mr. *Bacon* and Mr. *Lewin*, in support of the appeal:

Where the agreement between the parties is, not that you shall not do a particular act, but that if you do the act, you shall pay a fixed sum of money, that very sum is the ascertained damage, and this Court never interferes. The Plaintiff is placed in his present position entirely by his own act; and a Court of law having determined the matter between the parties, a Court of equity ought not to interfere—the question being one particularly for the consideration of a Court of law. In *Lowe v. Peers* (a), Lord *Mansfield* observes: “Courts of equity will relieve against a penalty, upon a compensation; but where the covenant is to pay a particular liquidated sum, a Court of equity cannot make a new covenant for a man, nor is there any room for compensation or relief.” In *Sloman v. Walter* (b), where the penalty of the bond was clearly only to secure the enjoyment of a collateral object, the Court very properly granted an injunction, and observed, that the penalty was only as accessional—the enjoyment of the object being the principal intent of the deed. *Woodward v. Gyles* (c) is a direct authority for the Defendant, the parties having in that case as in this, agreed on the damage. But the present case is stronger in its circumstances than any of the cases cited, inasmuch as the Plaintiff has, since the recovery of the damages in the action at law, proved under the fiat issued against the Defendant, for the sum of 135*l*, the

(a) 4 Burr. 2228.

(b) 1 Bro. C. C. 418.

(c) 2 Vern. 119.

amount of the Plaintiff's costs in the action—a proof in bankruptcy being a statutable execution (*a*). At all events, the question ought not to be discussed until the hearing of the cause. [*French v. Macale* (*b*) was also cited in support of the motion.]

1849.
SAINTER
v.
FERGUSON.
—
Argument.

Mr. *James Russell*, for the Plaintiff:

In the Court below, the learned Judge, on the original motion for the injunction, expressed his opinion that the Plaintiff's title was the same in equity as at law, and therefore directed the question as to the injunction to stand over until after the trial of the action at law, and on the renewed motion for an injunction, the same was granted. In *Logan v. Wienholt* (*c*), where a party entered into an agreement to settle a particular sum of money, this Court granted an injunction, notwithstanding the remedy appeared to be at law.

[The LORD CHANCELLOR.—That was the case of a penalty, and not of liquidated damages; but, although this Court gives effect to a legal contract, could the Plaintiff bring another action for continuing damage after judgment obtained? Has not that proceeding destroyed the Plaintiff's right of action?]

At law, the Plaintiff has, I apprehend, no further remedy; but in the present case, the Plaintiff proceeded at law by direction of the Court below, the legal validity of the agreement being disputed by the Defendant; whereas, if left to his own judgment, the Plaintiff would not have pursued that course.

[The LORD CHANCELLOR.—Is there any authority to be

(*a*) *Ex parte Dickson*, 1 Rose, 98. (*b*) 1 Con. & Lawson, 459.
(*c*) 1 C. & F. 611.

1849.
 SAINTE
 v.
 FERGUSON.
 —
Argument.

found to the effect, that this Court will grant an injunction against a Defendant, after he has paid the damages recovered in a court of law? If a party pays the price, surely he is entitled to the thing he contracts for, which, in the present case, was the right to practise as a surgeon and apothecary in the town of *Macclesfield*.]

The agreement is divisible into two parts: and the first part is, that the Defendant shall not practise as a surgeon and apothecary; and the second, that the Plaintiff shall have the 500*l.*; but he does not ask for both. The Court may restrain the Plaintiff from proceeding on the judgment obtained in the action, if it choose to do so, on the Plaintiff seeking its interference by way of injunction, the action at law being merely subsidiary and collateral to the suit, and in aid of it. As to the costs of the proceedings in the action, they are quite distinct from the damages recovered, and solely arise out of the recovery of the damages.

The LORD CHANCELLOR:—

Judgment.

I have in vain asked for authority in support of the Plaintiff's application, and the question is, whether I am now to establish a new practice in cases of this kind. When a party comes to this Court to restrain the doing of an act, he does so because the remedy at law is not adequate, and the damages to be recovered will not be a sufficient compensation to him; and in such a case this Court will interfere. In the present case, the Plaintiff has entered into a contract in writing, with the Defendant, and the terms of it, in effect, are, that the Defendant shall not practise as a surgeon or apothecary, within certain specified limits, and that if he do so practise, he shall pay the Plaintiff the sum of 500*l.* The Defendant having violated the agreement,

he Plaintiff asks for an injunction to restrain him from continuing to practise; but there are no grounds for this Court's interference, until the legal right has been ascertained. This Court, however, will put the matter in a train for legal investigation, and it has done so in the present case; the order pronounced in the Court below imposed no terms, and the Plaintiff proceeded in his action, and the case is the same as if the Plaintiff had brought his action against the Defendant in the first instance; and if the Plaintiff had pursued that course, and recovered damages, this Court would not afterwards have interfered, inasmuch as the agreement would then have been at an end. What has taken place does not alter the rights of the parties. The application for the injunction, when first made, was refused under the then existing state of circumstances, and the case is not altered as it now stands. The Plaintiff is not entitled to any equitable right arising out of the legal contract entered into between the parties; and having recovered the sum of 500*l.*, as damages for the Defendant's breach of the contract, the Plaintiff cannot ask for an injunction also, and he has no right to the choice contended for on his behalf. I allow the appeal, and give the Defendant the costs of the renewed motion, made in the month of June last in the Court below.

1849.
 SAINTE
 v.
 FERGUSON.
 Judgment.

Mr. *Russell* asked that the Plaintiff's costs at law might be set off against the costs of the motion, ordered to be paid to the Defendant: but

The LORD CHANCELLOR said he had no power to make such an order.

1849.

Nov. 6th.

In re THE ST. GEORGE'S STEAM PACKET
COMPANY.

The Master charged with the winding up of a Company, having, on two separate occasions, declined to place the name of J. P. on the list of contributories, either on his own account or in the character of a personal representative, and the Vice-Chancellor having, on two distinct appeals from those decisions, confirmed the same; an application was made to the Lord Chancellor, to vary the two orders of the Vice-Chancellor, and asking that J. P. might be included in the list of contributories, as a contributory either in his own right or as personal representative of his late father, for a certain number of shares in the Company, or any less number of shares, and either for the whole in one character, or for part in one character and other part in another character, as the Court should think fit:—*Held*, on a preliminary objection, that this was in the nature of an original motion, and ought not to be heard before the Lord Chancellor.

THE Master, charged with the winding-up of this Company, under the Joint-stock Companies Winding-up Act, 1848, had declined to put *Joshua Pimm* on the list of contributories, and a motion on behalf of the official manager, by way of appeal, was made in the month of June, 1849, to the Vice-Chancellor *Knight Bruce*, seeking that the name of *Joshua Pimm*, on his own account, should be inscribed on the list, in respect of forty shares, which was refused.

Another motion was made, on the 4th of July following, to the same Judge, by way of appeal from a second decision of the same Master, seeking that the name of *Joshua Pimm* might be placed on the list of contributories, in respect of the same shares, in his character of executor of his late father, deceased, which was also refused; and thereupon the official manager moved, by way of appeal to the Lord Chancellor, that the two orders of the Vice-Chancellor *Knight Bruce* might be discharged or varied, and that *Joshua Pimm* might be included in the list of contributories of the said Company, as a contributory either in his own right or as personal representative of his late father, for the number of forty shares, or any less number of shares, and either for the whole in one character, or for part in one character and other part in another character, as the Court should think fit, or that the Court would be pleased to make such further order as it might deem best.

Mr. Roundell Palmer and Mr. Pearson, for the Respond-

ent, *Joshua Pimm*, objected to the notice of motion, as irregular, inasmuch as it asked his Lordship to entertain a question which was not before the Master, and to do what the Master could not have done on any notice before him, and was an evasion of the provisions of the "Winding-up Act, 1848." It was also urged, that the object of the Act of Parliament was, that a party summoned before the Master might know what case he had to meet; and that the motion before his Lordship was not an appeal from any case that had been as yet heard by the Vice-Chancellor *Knight Bruce*.

1849.
 In re
 ST. GEORGE'S
 STEAM PACKET
 COMPANY.
 Argument.

The 78th and 99th sects. of the "Winding-up Act, 1848," and the cases of *In re The North of England Joint-stock Banking Company*, *Ex parte Glaholm (a)*, and *Hutchinson's case (b)*, were cited in support of the objection.

Mr. *Bacon* and Mr. *Prior*, in support of the motion, said, the object of it was to avoid circuitry of proceeding, and in the least expensive way to rehear the two decisions of the *Vice-Chancellor*, the Master having come to two conclusions in the matter, one of which must be erroneous. It was further urged, that the Respondent might be found liable as to some only of the shares, but could be charged in only one character in respect thereof.

The LORD CHANCELLOR, after observing, that the notice of motion clearly contained matter that was not before the Vice-Chancellor *Knight Bruce*, and that it was, therefore, contrary to the spirit of the "Winding-up Act, 1848," refused the motion, with costs.

At a subsequent part of the day, on Mr. *Bacon* stating

(a) *Ante*, p. 121.

(b) 1 De G. & S. 563.

1849.

*In re*ST. GEORGE'S
STEAM PACKET
COMPANY.*Statement.*

to his Lordship, that, by the "Joint-stock Companies Winding-up Amendment Act, 1849," sect. 33, a rehearing could not be had after the expiration of three weeks from the date of the order complained of, leave was granted by his Lordship to the official manager to amend the notice of motion, but without prejudice to any objection which the Respondent might be advised to take on the ground of the time allowed by the "Joint-stock Companies Winding-up Amendment Act, 1849," for an appeal or rehearing, having expired

The motion was afterwards abandoned.

Nov. 6th &
7th.

The administratrix of a deceased partner in a colliery, executed an assignment of all his shares in collieries, and other personal estate, which were divided among and accepted by his daughters in equal shares, as their portions of his estate under the Statute of Distributions.

The partnership affairs had not been wound up:—*Held*, that as the administratrix was still subject to the partnership liabilities, she was entitled to institute a suit against the surviving partners for the purpose of taking the partnership accounts; and that, notwithstanding her children were not parties to the suit.

Where two members of a partnership obtained a renewed lease of the partnership premises, and the administratrix of a deceased partner shewed a *prima facie* title to participate in the benefit of it, the Court protected the property until the rights of the parties could be decided, by appointing a receiver.

CLEGG v. FISHWICK.

SINCE 1807, a partnership had existed for working a colliery at *Altham*, in *Lancashire*, which had been carried on under the firm of "The Altham Coal Company." The proprietors consisted, in 1807, of thirteen persons, who were all interested in the partnership in equal shares. Those parties were all now dead. There were no articles of partnership, nor was there any provision that the representatives of a deceased partner should continue to be interested in the partnership.

On the 1st of June, 1807, the partners procured a lease of the coal under certain estates for twenty-one years. At the expiration of that lease, in 1828, the shares in the partnership had become vested in equal shares in the following parties:—*Henry Clegg, Richard Clegg, John Green, junior, James Green, Joseph Massey, and William*

Fishwick, who were all now dead, except *James Green*, who was one of the Defendants.

1849.
 CLEGG
 v.
 FISHWICK.
 —
 Statement.

On the 4th of June, 1828, a renewed lease was granted to those six partners for twenty-one years, from January, 1828. This lease contained a covenant on the part of the lessees, that at the expiration of it the lessor should be at liberty to purchase, at a valuation, all such of the machinery and implements used in the mines as he should wish to retain.

Between June, 1828, and the 1st of January, 1839, *Henry Clegg* died, and the Plaintiff was his widow and administratrix. Within the same interval *Joseph Massey* also died, having bequeathed his interest in the Company to his sons, *John Massey* and *Lord Massey*, who were also his executors, and who were two of the Defendants.

On the 1st of January, 1839, the four surviving partners and the representatives of the two deceased partners procured a lease for ten years of the surface of certain lands, forming part of the surface lands over the mines comprised in the lease of June, 1828.

The partners, prior to December, 1839, constructed a tramroad of about 2000 yards long, from the colliery, across the lands of Mr. *Fort*; and in December, 1839, a lease of the tramroad was granted by Mr. *Fort* to the same persons who were named as lessees in the lease of January, 1839, except *John Massey*, for nine years, from June, 1840. The lease also comprised certain rights of way, and a small piece of surface land.

A few days afterwards, Mr. *Fort* conveyed the fee simple of certain mines to the same parties who were named as lessees in the last-mentioned lease, and they were to be

1849.
Clegg
v.
Fishwick.
Statement.

held for such purposes as the partners should direct. The consideration money paid to him was 1439*l.* 11*s.*, which was taken out of the funds of the Company.

William Fishwick died in December, 1839, and *George Fishwick* became his personal representative, and was made a Defendant. *John Green* died in November, 1841, and his personal representatives were also Defendants.

The bill alleged, that, before the expiration of any of the above-mentioned leases, *George Fishwick* and *Lord Massey*, secretly, and without any communication of their intention to their other copartners, procured renewed leases to be granted in their own names, first, of the premises comprised in the lease of the 4th of June, 1828, and next, of the premises comprised in the lease of the 1st of January, 1839. The renewed leases were dated in December, 1845.

Shortly afterwards, *Richard Clegg* died, and his personal representatives were also Defendants.

In November, 1848, the Plaintiff received a letter from the solicitor of *George Fishwick* and *Lord Massey*, proposing that some arrangement should be made for settling the affairs of the partnership, and the new lessees proposed to take the stock, and to carry on the colliery for their own benefit.

This bill was filed in June, 1849. It charged, that since the expiration of the lease of the 4th of June, 1828, *George Fishwick*, *Lord Massey*, and *Richard Clegg*, had continued to carry on the workings, by means of the capital stock and effects of The Altham Coal Company.

The bill prayed that the copartnership might be dissolved, or declared to have ceased, and for an account of

all the partnership dealings, so far as might be necessary for ascertaining the rights of all the parties, and for a declaration, that the renewed leases were subject in equity to a trust for the benefit of the copartnership, or ought to be applied as partnership property, and that the partnership property might be realised; and for an injunction to restrain *George Fishwick* and *Lord Massey* from transferring or dealing with the leasehold interest, under the renewed leases, without the consent of the Plaintiff and all the other copartners; and to restrain them and *Richard Negg* from interfering with the partnership affairs, and for a receiver.

1849.
 CLEGG
 v.
 FISHWICK.
 —
Statement.

A motion for an injunction and a receiver was made immediately.

George Fishwick and *Lord Massey* stated by their affidavits, that the proposal for a renewed lease was accepted by the lessors as proceeding from themselves alone; that the names of the surviving lessees and representatives of the deceased lessees were given by them to the lessors, who expressly declared that the lessees must be disconnected from any other parties; that the Plaintiff or some of her connexions, and also other parties who were connexions of some of the other deceased partners, had tendered or applied for a renewed lease on their separate account; that *Henry Clegg* was an active agent in procuring the renewed lease of 1828 to be granted to himself and his then partners, to the exclusion of the representatives of their deceased partners; and that he then declined to be connected with the representatives of deceased parties who were unable to assist in the working of the colliery.

It also appeared, that by a deed dated the 19th of February, 1839, the Plaintiff and her children, and their husbands, appointed arbitrators to make a partition among

1849.
Clegg
v.
Fishwick.
—
Statement.

them of the real and personal estate of *Henry Clegg*; and that by another deed, dated the 20th of February, the Plaintiff and her children, and their husbands, conveyed and assigned all *Henry Clegg's* real and personal estate, expressly mentioning "shares in collieries," to the arbitrators, to enable them to make a partition among the parties who should be entitled to them under the award. An award was made on the 19th of June, by which that part of *Henry Clegg's* personal estate was awarded to his children in equal shares, so that the Plaintiff ceased to have any beneficial interest in it.

This arrangement was not mentioned in the bill.

For ten days after January, 1839, the works were stopped, to enable surveyors to value the machinery and stock and effects, which the new lessees proposed to purchase; and notices were circulated and advertised in the newspapers, that the late partnership was dissolved, and that the colliery would thenceforth be carried on by *George Fishwick* and *Lord Massey*.

The motion was heard before the Vice-Chancellor *Wigram*, who ordered that the Defendants, *George Fishwick* and *Lord Massey*, declining to enter into an undertaking to pay into Court one-sixth of the profits of the partnership undertaking, including the renewed leases, it should be referred to the Master to appoint a receiver of one-sixth of the profits of the said partnership undertaking, including the renewed leases, with liberty for the said Defendants to propose themselves.

A motion was now made before the *Lord Chancellor*, on behalf of those two Defendants, that the order of the Vice-Chancellor *Wigram* might be discharged.

Mr. *Wood* and Mr. *Elmsley*, in support of the motion:—

There are three objections to the order, which is appealed from:—

1849.
Clegg
v.
Fishwick.
Argument.

1. Even if the bill alleges that the Plaintiff has such an interest as might enable her to ask the Court, on motion, for such an order, she is not entitled to it on the merits.

2. It appears that there is a total want of any such interest in the Plaintiff as would enable her to maintain such a suit.

3. She has come too late.

1st. The Plaintiff never was a partner in the colliery. She merely represents one of the late partners, and all that she is entitled to is an account of the partnership transactions so long as any part of her husband's estate remains in the partnership. It was well known that the old lease would soon expire, and with that lease the partnership would also terminate. It is not the usual course of things, for surviving partners to continue a partnership with the representatives of a deceased partner, particularly when such an employment of the deceased partner's assets would in itself constitute a breach of trust. All parties were heretofore at liberty to apply for a new lease; and where there is no concealment or unfair dealing, and the lessor expressly refuses to treat with all the former lessees, and selects the parties to whom alone he is willing to grant a new lease, what ground is there upon which the rejected partners, or the representatives of a deceased partner, can demand any right to participate in the benefit of the new lease?

2nd. The Plaintiff has assigned all her interest in the "shares of collieries" of her late husband, and her children are now entitled to the benefit of them. She is merely a

1849.
 CLEGG
 v.
 FISHWICK.
 —
Argument.

trustee, without any interest, and her *cestuis que trust* are not parties to this suit. They cannot be made co-Plaintiffs, because there would then be a misjoinder; and if they were made Defendants, that would not give the Plaintiff any right to sue, and the order appealed from could not be regularly made in any suit in which Mrs. Clegg is the Plaintiff.

3rd. The renewed lease was granted in 1845, and the bill was not filed till June, 1849. All the parties were aware of the transaction, and it is too late now to attempt to upset it.

The *Solicitor-General* and Mr. *Little*, for the Plaintiff.

[The LORD CHANCELLOR.—I will not trouble you on the first point; I think, if the Plaintiff has an interest, the Court will take care to secure the property till the rights of the parties are decided. On the point of interest I shall be glad to hear you.]

The Plaintiff is the party who is alone liable at law for anything which may be payable, in respect of the partnership, by her husband's estate. She was treated as a partner, for her name was used in some of the leases, and in the conveyance from *Fort*. She is held out as a partner, and cannot now be deprived of the rights of one: *Wagh v Carver* (a).

It is her duty to see that all the partnership liabilities are properly discharged, and to receive her husband's share of the surplus of the partnership property, after paying all demands against it. The object of the bill is to realise the partnership assets. She will then be a trustee of her husband's share, for the benefit of her children, but she can-

(a) 2 H. Bl. 235.

not make them partners in the colliery. They could never maintain a suit for the partnership accounts, nor could any action be brought against them as partners. In *Brown v. De Tastet* (a) it was decided that a partner may assign his share for the benefit of others, but that he cannot introduce those assignees as partners in the concern. He continues a partner, notwithstanding his assignment. The partnership contract is between him and his partners. The contract, which affects his own share only, does not give his assignee any claim against the other partners.

1849.
 CLEGG
 v.
 FISHWICK.
 —
 Argument.

[The LORD CHANCELLOR.—The difficulty is, that after the Plaintiff has parted with the property to the assignee, she is still liable for the debts. In *Brown v. De Tastet*, the assignment was of part only of a share. Here the whole is assigned.]

The assignment is, in effect, an assignment merely of what she takes after she has discharged her share of the partnership liabilities as administratrix, and it will not deprive her of the power to have them settled.

In *Featherstonhaugh v. Fenwick* (b), a lease renewed by one partner was dealt with as partnership assets. If a sale of the partnership property is likely to be most beneficial, the Plaintiff is entitled to have it sold: *Crawshay v. Maule* (c), *Cook v. Collingridge* (d).

Mr. Elmsley, in reply:—

Brown v. De Tastet does not affect this case, because the Plaintiff has assigned *all* her interest. If she has parted with all her husband's assets, and is still liable to any of the creditors of the partnership, she may have acted in-

(a) Jac. 284.

(b) 17 Ves. 310.

(c) 1 Swanst. 495.

(d) Jac. 607.

1849.
Clegg
v.
Fishwick.

cautiously, but she is still without any interest which will enable her to maintain this suit.

The LORD CHANCELLOR:—

Judgment.

The only difficulty in this case is with regard to the position in which the Plaintiff stands, as representing the property. [His Lordship stated the circumstances of the case]

Now, when the contract for the renewed lease was made, and that lease was taken, the Plaintiff, as the representative of her husband, had an equal interest with the other lessees in the old lease, which was the foundation of the new one. It was the tenant right of renewal, arising out of the old lease, which gave the partners the benefit of this new lease,—at least the law assumes that to be the case. The Defendants say that there are circumstances which interfere with the ordinary right: but we know that the rule of equity is, that partners interested jointly with others in an old lease, cannot take to themselves the benefit of a new lease, and exclude their copartners. The Plaintiff, so far, shews such a *primâ facie* case as entitles her to ask the Court to protect the property until the cause comes on to be heard. If she was unable to do that, the Court would not interfere; but if a plausible ground is shown for the application, the Court will then interfere, and protect the property in the meantime.

This, however, is met on behalf of the Defendants, by saying that the Plaintiff has assigned all her husband's interest in the lease, and has divided his property among his next of kin, and by thus parting with all her interest, she is not entitled to institute this suit against the partners, and to claim this as partnership property.

Now, that at first raised a difficulty in my mind, which

I was anxious to have considered before I disposed of the case. But I am clearly of opinion that the Plaintiff has not lost her right, nor can she denude herself of the duty of realising the partnership property. She is the only person who can do it. Those to whom she assigned this interest cannot do it: they have no privity with the Defendants. If it had been a case of a part-owner of property not the subject of partnership, without any duty to perform, and the share of the deceased part-owner had been assigned, it might be said that the right to the benefit of the new lease would accrue to those who could show a right to the assigned share; but in that case there would be no duty to be performed. But the assignment of 1839 cannot take effect in this way. There is nothing to assign, except what might remain after winding up the partnership affairs. It was property which was part of the partnership estate, and that estate must be realised and made applicable to the discharge of the liabilities of the partnership, all of which liabilities must be got rid of before anything could arise which could be the subject of assignment. She had a duty to perform, as between herself and the other partners. Some beneficial interest arising from this property might become part of the husband's undisposed of estate; but it would be only that which remained after settling the partnership affairs. Now that settlement has not been yet effected, and therefore she, as between herself and the Defendants, is now seeking to have the partnership affairs settled, the partnership debts paid, and the partnership property realised, for the purpose of meeting the obligations. She has not parted with that interest: she has it not in her power to part with it. To say that she assigned it to her children, is to say she did more than she can do by law. She merely assigned to her children that which was her husband's, and nothing belonged to the husband except his share of what remained after the prior obligations of the partnership were satisfied.

1849.

CLEGG

v.

FISHWICK.

Judgment.

1849.

Clegg

v.

FISHWICK.

Judgment.

Therefore, I am of opinion she has still left in her such an interest, arising out of her duty as her husband's personal representative, as gives her a right to realise the partnership property, and assert her title to the new lease as part of that partnership property. And I think the order of the *Vice-Chancellor* was right, and the appeal motion must be refused, with costs.

1848.

July 29th.

1849.

Nov. 8th.

RUBERY v. MORRIS.

Where a Plaintiff dismisses his own bill against a pauper Defendant, with costs, the Defendant is entitled to *dives* costs.

Statement.

THE Defendant in this cause had obtained an order to defend *in formâ pauperis*. The Plaintiff afterwards dismissed the bill, with costs. The Taxing Master allowed the Defendant *pauper* costs only; and the question was then raised, whether the Defendant was not entitled to *dives* costs.

The point was first submitted to the *Vice-Chancellor of England*, who decided that he was entitled to *dives* costs.

It was afterwards mentioned to the *Lord Chancellor*, who inquired into the practice, and the Taxing Masters gave an unanimous certificate that in such cases it was the practice to allow *pauper* costs only.

The case is reported in 16 Sim. 312.

Mr. Rolt and Mr. W. M. James appeared for the different parties.

The LORD CHANCELLOR, in delivering judgment, said that he considered it to be most consistent with principle, that if a party asserted by a bill an unfounded claim, or resisted by his answer a well-founded claim, he ought not to be allowed in either case to profit by the poverty of his opponent; and that, if a Plaintiff dismissed his own bill, and thereby admitted that his claims were unfounded, he ought to pay the costs of the Defendant, whether he was defending as a pauper or not; but his Lordship intimated, that it might be a matter of consideration whether some General Order upon the subject might not be desirable.

1849.
 RUBERY
 v.
 MORRIS.
 Judgment.
 Nov. 8th.

In re THE SHREWSBURY GRAMMAR SCHOOL.

Nov. 10th
 & 12th.

THIS petition was presented under Sir *S. Romilly's* Act, 52 Geo. III. c. 101, by the governors and trustees of the Free Grammar School of King *Edward VI.* at *Shrewsbury*, and by the Mayor of *Shrewsbury* and Sir *Baldwin Leighton*, both of whom were governors and trustees.

It stated the original foundation of the school by King *Edward VI.*; certain deeds of endowment executed during the reign of Queen *Elizabeth*, which also contained regulations for the management of the school; and an Act of the 38 Geo. III., c. lxxviii., for the better government and regulation of the school. Some of the particulars of these documents are stated in *In re Shrewsbury School*, 1 Myl. & Cr. 632. Part of the endowment consisted of the tithes of certain parishes in the neighbourhood of *Shrewsbury*.

The property of the school was vested in the trustees and governors. The master was appointed by *St. John's College, Cambridge*, and the visitatorial powers were vested in the Bishop of *Lichfield*; the corporation of *Shrewsbury*

The Court has jurisdiction upon a petition presented under Sir *Samuel Romilly's* Act, not only where the trustees of charity estates require directions to carry out a defined trust, but also where, although the application of future surplus funds has been already provided for by an Act of Parliament, the trustees ask for a reference to the Master, as to the expediency of applying for another Act of Parliament to authorise the application of the surplus in a different manner.

1849.

In re
SHREWSBURY
GRAMMAR
SCHOOL.

Statement.

presented to the ecclesiastical benefices, and the sons of burgesses of *Shrewsbury* were eligible to, and in most instances had a preference with regard to the exhibitions. By the 24th sect. of the Act of 38 Geo. III., c. lxviii., the surplus (if any) of the revenues of the school was to be applied toward the founding, creating, and maintaining one or more exhibitions at *Oxford* or *Cambridge*, or in increasing some of the existing exhibitions; or, if the trustees and governors thought proper, in augmenting the stipends of the vicar of *Cherbury* and curates of *St. Mary* and of *Astley* and *Clure*, whose stipends were very small.

The petition stated that the present income of the school was upward of 3000*l.* per annum, and left a surplus of about 400*l.* per annum, and that a fund of 3800*l.* Three per Cents. had arisen from the accumulations of the surplus since 1840. There were at the present time one hundred scholars in the school, and the number of exhibitions was twenty-six. It was therefore considered by the governors not to be desirable to exercise the power given by the Act, of increasing the number of exhibitions.

The object of the trustees and governors was to obtain proper sanction for some regulations which had been already adopted, in allowing the master to take boarders, and in teaching modern languages. They also wished to make some alteration in the time for which some of the exhibitions were to be held, and in the amount of them: to provide an accident school for teaching boys who might be desirous of receiving a more commercial education than the scholars in the present school: to sell one house belonging to the school: and also to make some alteration in the qualifications of the boys who were to be eligible to exhibitions, and to increase the stipends of the clergy before mentioned. They were also anxious to introduce some trifling alterations in matters of detail, such as applying a

small annual sum in giving prizes to the boys, and for having an annual examination, and also in establishing a library for the use of the school.

1849.
In re
SHREWSBURY
GRAMMAR
SCHOOL.
Statement.

The petition was first heard by the *Vice-Chancellor of England*, who was of opinion that, under Sir *Samuel Romilly's* Act, under which the petition was presented, the Court had no authority to make such an order as was asked for; that where the trusts were defined, and the trustees required directions from the Court as to the mode of carrying them out, the Court could interfere upon petition; but that in the present case the trusts were clearly laid down by the Act of Parliament of the 38 Geo. III., and the object of the petition was, not to have directions how to give effect to those regulations, but to consider the propriety of departing from them; and if that were to be done at all, the matter must be brought forward by information.

The petition was thereupon brought before the *Lord Chancellor*, by way of appeal.

The *Solicitor-General* and Mr. *Kenyon* appeared for the Petitioners; and

Argument.

Mr. *Stuart*, on behalf of the Bishop of *Lichfield*, and Mr. *Rolt* and Mr. *Wray*, for the Corporation of *Shrewsbury*, supported the petition.

Mr. *Wood* and Mr. *Wickens*, for Dr. *Kennedy*, the headmaster, and Mr. *Bacon* and Mr. *Glasse*, for *St. John's College*, opposed the petition.

They contended that there was no dispute in the case, as to the propriety of any past transaction with regard to the school, and if there were any surplus, the Act of the 38 Geo.

1849.

In re
SHREWSBURY
GRAMMAR
SCHOOL.

Argument.

III. directed the application of it. This was therefore not included in those cases which Sir *Samuel Romilly's* Act was intended to affect, and the Court had no jurisdiction, upon a petition under that Act, to entertain such an application as the present, which was merely to obtain liberty to go to Parliament for an Act, to alter the provisions of a former Act.

[The LORD CHANCELLOR.—The trustees allege that there is a surplus, which, for some reason, cannot in their judgment be properly applied in the manner pointed out by the Act of Geo. III. That is quite enough to induce the Court to act upon the petition, if, in the discretion of the Court, a case is made out for its interference.]

As to the increase of the stipends of the officiating ministers, that was provided for by the Act of Geo III., in case a surplus existed. But it was not shewn satisfactorily that there was a surplus. The tithes had been commuted, and if there should be any reduction in the amounts to be paid in respect of those commutations, all chance of a surplus would be taken away. There was scarcely anything which the Petitioners desired, which the Act of Geo. III. did not already enable them to do, except to establish a commercial school; and unless a clearer case as to the existence of a large surplus, and also a greater necessity for further powers could be shewn, this application was altogether premature and unnecessary: *The Attorney-General v. The Earl of Devon* (a).

With regard to selling part of the real estate of the charity, it was stated in *The Attorney-General v. The Corporation of Newark* (b), that there was but one instance in which such a thing had been done without the authority of an Act.

(a) 15 Sim. 259.

(b) 1 Hare, 400.

The *Solicitor-General* was heard in reply, only upon the merits of the case, and not upon the question of jurisdiction.

1849.

In re
SHREWSBURY
GRAMMAR
SCHOOL.

The LORD CHANCELLOR:—

I am quite satisfied that the Court has power, and that the words of the Statute are equivalent to this, viz. that whenever it occurs that the assistance of the Court is required in the administration of charity estates, a jurisdiction is given by the Act. The question comes then to this,—is or not this a case in which the assistance of the Court is required by the trustees in the administration of the charity funds? There are charity funds in the hands of the trustees, which were not contemplated by the author of the gift, because there are accumulations which have arisen, from the income being larger than was required for the objects to which it was to be applied. They say “We have funds, which we admit to be charitable funds, and we do not know precisely the mode in which they ought to be first applied.” If that were all, and there were no Act of Parliament directing the application, it would be the very ordinary case which has so often occurred since the passing of that very useful Act, in which parties ask the direction of the Court touching the application of funds with respect to which there are either no specific directions as to the trust which the trustees are to execute, or which, for some reason or other, cannot be properly and advantageously applied in execution of those trusts. They say, that in such a state of circumstances the Act of Parliament interposes in this case, and that it is, in point of fact, the scale and rule which ought to be followed.

Judgment.

I have perused the Act, and cannot find that it at all provides for all these circumstances which have occurred, and which the trustees have now brought forward, and

1849.

In re
SHREWSBURY
GRAMMAR
SCHOOL.

Judgment.

which were not at all contemplated at the time the Act of Parliament passed. Certainly many of the things which are now asked might require parliamentary authority to alter, but others which have arisen in the administration of the trust are not at all contemplated by the Act of Parliament, and therefore it does not lay down any rule by which the discretion of the trustees is to be exercised. Therefore, I have no hesitation in coming to the conclusion, that what is now asked properly brings the case within the meaning of that enactment, and that the present is a case in which the assistance of the Court is required for the administration of the charity funds.

With regard to an Act of Parliament, or such matters as may require the authority of Parliament to alter, it is a constant occurrence, that the Court is asked to inquire whether an Act of Parliament shall be applied for. If the application is in regard to such a matter as this Court has no jurisdiction to alter, or which is already provided for by Act of Parliament, it is obvious that the authority of Parliament is requisite in such cases, to enable the trustees to depart from that which is their prescribed duty, according to the rule existing; and it is the constant practice for the Court to inquire in the first instance whether it is right or wrong; that is, whether it is for the interest of the charity—whether it is beneficial—for Parliament to interfere. As far as the House of Lords is concerned, I know it never authorises an interference with a charity fund, without the previous sanction of the Court of Chancery. I have found in the House of Lords, bills for that purpose, which committees of that House have very properly suspended until the matter has been brought before the Court of Chancery, in order to ascertain what direction the Court thought proper to make; the House of Lords not professing to exercise the jurisdiction of the Court of Chancery, but only to carry into effect that which the Court of Chancery

thinks it right should be done, in furtherance of the objects of the charity. That appears to have been the only difficulty the *Vice-Chancellor* entertained in this case; he had no hesitation as to this being a proper matter for the interposition of the Court, provided the Court had authority to do what is sought. But I have no doubt about the authority, and, agreeing with the *Vice-Chancellor* that it is a proper matter for the interposition of the Court, my opinion is, that the order ought to be made.

1849.

In re
SHREWSBURY
GRAMMAR
SCHOOL.

Judgment.

The LORD CHANCELLOR gave the head master leave to attend before the Master, reserving all questions as to the costs of such attendance. His Lordship also allowed *St John's College*, and the Corporation of *Shrewsbury*, to attend at their own expense. The Bishop of *Lichfield* and the incumbents of the livings in the gift of the charity, were also allowed to attend. The costs of the petition before the *Vice-Chancellor* were reserved till the Master should have made his report.

1849.

Nov. 12th &
13th.

DE VISME v. DE VISME.

By the conditions of sale under a decree, it was provided, that the purchaser of each lot should pay the remainder of his purchase-money into the Bank, to the credit of the cause, on or before the 26th of December, 1845, and should then be entitled to the receipt of the rents from the 25th of the same month; but if the purchaser should fail in making such payment, then and in such case, and from whatever cause the delay might have arisen, he

BY an order made on the 17th of July, 1847, on a motion by *Benjamin Hooke*, the purchaser of an estate sold under a decree in this cause, *Benjamin Hooke*, by his counsel declaring himself content with the title, was ordered (*inter alia*) to pay in the balance of his purchase-money (9432*l.*), with interest at 5*l.* per cent. per annum from the 26th of December, 1845, to the 7th of August, 1847, but without prejudice to his rights (if any), on any application he might be advised to make to the Court, for compensation or allowance, by reason of any alleged delay on the part of the Plaintiffs or vendors in completing the title to the estate purchased; and it was also ordered that *Benjamin Hooke* should be let into possession of the purchased estate, and the receipt of the rents and profits thereof, according to the conditions of sale.

Benjamin Hooke died on the 6th of November, 1848, having previously paid the balance of his purchase-money,

should pay interest at the rate of 5*l.* per cent. per annum on the balance of his purchase-money, from that day until the payment thereof. It was also provided, that the vendors should, within three days from the confirmation of the purchase, deliver an abstract and deduce a good title to the lots sold. The order nisi was confirmed absolutely on the 4th of December, 1845, and no abstract was delivered to the purchaser until the 3rd of January, 1846, and the title was not completed until August, 1847. On the 23rd of December, 1845, the purchaser deposited the balance of his purchase-money with his private bankers, at 2*l.* 10*s.* per cent. per annum interest, and gave notice thereof to the vendors, and that the difference of interest between 5*l.* per cent. and 2*l.* 10*s.* from the 7th December 1845, must be at the loss of the vendors, so long as they delayed the delivery of the abstract. In August, 1847, the purchaser paid the balance of his purchase-money, with 5*l.* per cent. interest, into Court, without prejudice to his right to compensation or allowance, by reason of the delay on the part of the vendors in completing the title to the purchased estate:—*Held*, on petition, reversing the decision of the Court below, that the purchaser was entitled to compensation, and for that purpose a reference was ordered to the Master to inquire and ascertain from what time a good title was shown, the payment of interest by the purchaser to commence from that time, and not earlier.

Esdaile v. Stephenson, 1 S. & S. 122, not followed.

In cases like the present, the principle strictly carried out, is, to postpone the payment of the purchase-money till the time when a good title was shown, the vendor being entitled to the rents up to that time, and the purchaser paying interest from that time; such time to be ascertained by the Master under the order of reference.

to the order of the Court. The executors of *Ben-Tooke* presented their petition to the Court under the order reserved by the before-mentioned order, stating the following (amongst other) facts, viz.:—By the condition of sale, it was provided that the purchaser of each lot should pay 20*l.* per cent. deposit, to be paid to the auctioneer to the credit of the cause. By the fifth condition, the purchaser of each lot was to pay the residue of his purchase-money into the Bank of England to the credit of the cause, on or before the 26th of December, 1845, and should then be entitled to the interest of the rents and profits from the 25th of the same month; but if the purchaser should fail in making such payment at the time and in manner aforesaid, then and in every such case, and from whatever cause the delay might arise, he should pay interest at the rate of 5*l.* per cent. per annum on the balance of his purchase-money from day to day until the payment thereof. By the sixth condition it was provided, that every purchaser should at his own expense obtain the usual orders allowing and endorsing confirming his purchase, and the usual order for the payment of his purchase-money into the Bank of England at the time aforesaid. And by the seventh condition it was provided, that the vendors should, within ten days from the confirmation of the order nisi on the Master's report of the purchase, deliver an abstract of title and deduce a good title to the several lots sold, conformably to the conditions and particulars of sale.

The order nisi on the Master's report allowing the purchase, was confirmed absolutely on the 4th of December, 1845, by an order of that date, which was duly read and entered. On the 13th of the same month, the vendors' solicitors applied for an abstract of title to the land estate; and, at the same time, expressly informed the solicitors of the vendors that the Master's re-

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1849.
 DE VISMÉ
 v.
 DE VISMÉ.
 —
Statement.

1849.
 DE VISME
 v.
 DE VISME.
 —
Statement.

port of the purchase had been absolutely confirmed; but, nevertheless, no abstract was delivered until the 3rd of January, 1846; and on the 23rd of December, 1845, the purchaser specifically appropriated the balance of his original purchase-money by paying the same into a separate account, in his name, with Messrs. *Farley & Co.*, bankers at *Worcester*, to remain with them at interest at 2l 10s per cent. per annum, and where the same remained to such account, and so appropriated, until the 9th of August, 1847. On the 29th of December, 1845, the purchaser's solicitors wrote to the solicitors of the vendors, complaining that the abstract of title had not been delivered, although the report of the purchase had been confirmed absolute on the 4th of that month, and stating that the vendors were committing a continuing breach of the terms of the contract, and that the purchaser would demand compensation; and informing the vendors' solicitors of the investment of the balance (9432l.) with Messrs. *Farley & Co.*, bankers, *Worcester*, at 2l 10s. per cent. interest; and that, as the conditions of sale required the purchaser to pay 5l per cent. interest per annum from and after the 26th then instant, the difference of interest must be at the loss of the vendors so long as they delayed the delivery of the abstract since the 7th instant, when it ought to have been sent. No answer was sent to that letter, but one part of the abstract of the vendors' title was sent to the purchaser's solicitors on the 3rd of January, 1846, and further parts thereof were respectively delivered to the purchaser's solicitors on the 20th of March and 17th of August, 1846, and on the 8th of January and the 11th of July, 1847. A perfect abstract of title was not delivered to the purchaser's solicitors until the last-mentioned date.

The petition then stated that the purchaser, by reason of the aforesaid proceedings, was unable to pay the balance of his purchase-money into Court until the 7th of August,

1847; and that, by reason of the vendors not having performed their part of the seventh condition of sale, the purchaser had suffered a loss of 380*l.*, or thereabouts, and prayed a reference to the Master to inquire and state whether the seventh condition of sale, relating to the delivery of the abstract, was or was not duly complied with by the vendors as between them and the said *Benjamin Hooke*; and if he should find that it was not complied with, then that he might also inquire and state what damage had been sustained by the purchaser, or what compensation in respect thereof the Petitioners, as his legal personal representatives, were entitled to, either by way of reduction of interest or otherwise; and that the amount of such damage or compensation might be paid to the Petitioners out of the produce of the sale of a sufficient part of the sum of stock standing to the credit of the cause, “the account of the purchase-money of *Benjamin Hooke*;” and that the Petitioners’ costs of the present application, and of the late purchaser’s extra costs in respect of certain affidavits on his motion for leave to pay his purchase-money into Court, might be paid to the Petitioners.

1849.
 DE VISMÉ
 v.
 DE VISMÉ.
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Statement.

Vice-Chancellor *Wigram*, after the hearing of the petition, dismissed the same, with costs, and from that order the Petitioners appealed.

The *Solicitor-General* and Mr. *Shapter* appeared in support of the appeal, and after stating the facts, and adverting to the cases of *Esdaile v. Stephenson*(*a*), and *Monk v. Huskisson*(*b*), which they insisted were inconsistent with each other, though decided by the same Judge, proceeded as follows:—

Argument.

(*a*) 1 S. & S. 122.

(*b*) 4 Russ. 121, in note theré.

1849.

DE VISME

v.

DE VISME.

Argument.

The delivery of a perfect abstract of title was a condition precedent, and the vendors could not insist on the fifth condition of sale being complied with by payment of 5*l.* per cent., unless they previously shewed a perfect title. Suppose the case of a vendor refusing to complete or to deliver an abstract of title at all; and then, on a bill being filed against him by the purchaser, it is found a good title could be shewn: would the purchaser, in such a case, be compelled by the Court to pay interest on the purchase-money, even if there was a condition of sale similar to the present one? In *Hobson v. Bell*(*a*), it was held that the term "abstract" meant a perfect abstract. In *Denning v. Henderson*(*b*), a purchaser was relieved from a condition like the present one, on account of the state of the title; and in *Morris v. Bull*(*c*), there were special circumstances that induced the Court to make the order for leave to pay the purchase-money into Court without acceptance of title.

Suppose, however, the rule to be inflexible, and that the purchaser must pay interest at 5*l.* per cent. on his purchase-money, still a case of damage has here arisen to the purchaser, by reason of the vendors not having performed their part of the contract, and therefore the purchaser is entitled to ask for a reference to the Master, to ascertain the amount of damage, where the question arises incidentally; and the present is a proper case for directing such a course of proceeding. According to the observations of Chief Justice *Tindal*, in the case of *Orme v. Broughton*(*d*), an action might be sustained in the present case against the vendors, for their breach of the condition to deliver their abstract of title; relief may therefore be afforded the purchaser in the present case in two ways, viz either by this Court directing an action at law to be brought; or, that course being clear, the Court may direct

(*a*) 2 Beav. 17.(*b*) 7 De G. & S. 689.(*c*) 17 Law Jour., N. S., Ch., 9.(*d*) 10 Bing. 533.

a reference to the Master to ascertain the damages sustained by the purchaser. In the case of an estate which has been sold as freehold, turning out to be leasehold, compensation is awarded to the purchaser; and if so, compensation ought to be allowed to the purchaser here.

1849.
 DE VISME
 v.
 DE VISME.
 —
Argument.

In *Esdaile v. Stephenson* there was no precedent condition; the purchase-money here has been paid into Court, with a special reservation of the purchaser's claim for compensation, if he can shew a title thereto. The objection to the purchaser sustaining a right of action for damages, which was adverted to by the *Vice-Chancellor* when deciding the present case, disappears entirely on a perusal of the judgment of the Court in *Henry v. Earl (a)*. There is here no question of variance of contract, but only of compensation to the purchaser out of the purchase-money remaining in Court. In *Greenwood v. Churchill (b)*, the Court made the order for payment of principal and interest, without prejudice to the right to compensation. [*Paton v. Rogers (c)*, *Francis v. Crywell (d)*, and *Frank v. Bassett (e)*, were also cited in support of the appeal.]

Mr. *Rolt* and Mr. *Greene* for the vendors:—

The order of the Court, confirming the Master's report absolutely, might have been obtained by the purchaser much earlier than the 4th of December, 1845, and the vendors had no actual knowledge of the existence of the order of that date, until the 29th of that month.

[The LORD CHANCELLOR.—The order nisi must have been served on the vendors, before the order of the Court confirming the order nisi absolutely, could have been obtained.]

(a) 8 M. & W. 228.

(b) 8 Beav. 413.

(c) 6 Madd. 256.

(d) 5 B. & Ald. 886.

(e) 2 My. & K. 618.

1849.
 DE VISME
 v.
 DE VISME.
 —
Argument.

The purchaser might obtain the order confirming the order nisi, on any day he pleased after the date of the order nisi, and was under no obligation to give the vendors notice of its existence. As soon, however, as the vendors received notice of the order absolute, they proceeded to deliver their abstract, which was done on the 3rd of January, 1846, and that abstract, at the time of its delivery to the purchaser's solicitors, was believed to be and was a substantial one, and ought to be considered such, although further requisitions were made by the purchaser, and additional short abstracts were subsequently furnished to the purchaser's solicitors: but, even assuming there was not a delivery of a perfect abstract in the first instance, no wilful misconduct is charged by the purchaser against the vendors, in the transaction.

[The LORD CHANCELLOR.—Could not the vendors, during those proceedings, have moved for payment of the purchase-money into Court?]

Probably not. As to the case of *Paton v. Rogers* (a), which has been cited, there existed in that case no special contract. In *Morris v. Bull*, the *Vice-Chancellor* says, he was originally informed that the rule was inflexible against payment of purchase-money into Court without prejudice to any question of title; but he found afterwards that such was not the case where special circumstances existed. In the case of *Orme v. Broughton* the contract was never completed. In the 3rd volume of *Sugden's Vend. and Purch.*, pp. 117 and 118, after adverting to *Birch v. Podmore* (b), and *Oxenden v. Lord Falmouth* (b), and the facts of those cases, the author concludes with the observation, that the rule would be otherwise where the contract extended to every cause of delay. According to the true construction of the

(a) 6 Madd. 256.

(b) Not reported elsewhere.

present contract, the purchaser absolutely binds himself to pay interest; and if so, how is he damaged? In reality, the purchaser ought to have signified his complaint to the vendors at the time of the breach of the contract, and then have put an end to it; but instead of taking that simple course, he completes the contract, and afterwards puts forward his complaint. Suppose the condition had been, that in case there should be a deficiency in the quantity of land expressed to be sold, there should be no compensation, what would have been the right of a purchaser in such a case?

1849.
 DE VISMÉ
 v.
 DE VISMÉ.
 —
Argument.

The present case is a much stronger one than either of the cases of *Oxenden v. Lord Falmouth* and *Esdaile v. Stephenson*. In *Denning v. Henderson* the Court had been originally applied to to receive the purchase-money, but it declined to do so. Breach or no breach of contract must always be the question in cases like the present.

[The LORD CHANCELLOR.—The purchaser says the vendors have been guilty of a breach of contract by non-delivery of their abstract; and as to the Master's report, the vendors having been served with the order nisi, a confirmation of that order within a reasonable time might be assumed.]

The vendors could not determine when the three days provided by the conditions of sale for the delivery of the abstract were to commence; and until the order nisi was confirmed, any person might apply to the Court for an order opening the biddings.

Mr. *Temple* and Mr. *R. W. E. Forster* appeared for parties in the same interest as the vendors.

[The LORD CHANCELLOR.—Mr. *Solicitor-General*, I must hear you upon the authorities, for they appear to me to be

1849.

DE VISME

v.

DE VISME.

Argument.

in a state of great confusion. There is not one principle laid down which can guide me, and I shall have, on looking into them, to say what the rule ought to be. As far as I at present have been able to collect anything from them, I cannot say what the principle is that is to regulate the point; for I find the very same Judge laying down the rule on one occasion one way, and on a subsequent occasion in another way. You need not trouble yourself upon the facts of the case. That there has been a breach of contract on the part of the vendors is quite plain. The day on which the abstract was to be delivered, was three days after the order was made absolute establishing the purchase: the vendors would have to look to that, and it is not at all the duty of the other party to call upon them to do it at any other time: it is a proceeding between the parties, and they had ample opportunity of ascertaining when it was to take place; the Plaintiffs are therefore bound as much as if they had had notice of the order of the Court confirming the order nisi; they are bound by the act of the Court, and therefore three days after the date of that order they were bound, according to their contract, to deliver the abstract. As to the effect of that upon the authorities, I shall be glad to hear any observations; at the same time I must say, a greater injustice and hardship cannot be conceived than would result from the rule laid down, viz. that a party having made a contract by which interest at 5% per cent. on the purchase-money is agreed to be paid, is to be at liberty—I do not say by fraud or covin—to get for himself a benefit by negligence or delay, and to postpone the party who has to pay the interest for an indefinite time, until he thinks proper, by the delivery of the abstract, to shew a good title. The interest may run on for years; the authorities, however, must decide the case.]

The *Solicitor-General*, in reply:—

The words “from whatever cause” must mean that the vendors shall not take advantage of their own negligence, covin, or fraud: *Rede v. Farr* (a). According to the view taken of *Esdaile v. Stephenson* (b), by the learned Judge in the Court below, the words “any cause whatever” might include the character of the acts of the vendors, as well as the acts themselves. In cases of this kind, the purchaser always intends to use due diligence to ascertain whether a good title can be shewn by the vendor or not; and if the case be to be determined on strict principle, this is clearly one for compensation, and similar to the case of an estate sold as tithe-free, which turns out to be subject to a tithe rent-charge.

The LORD CHANCELLOR, after several observations had passed between his Lordship and the *Solicitor-General*, with reference to the terms of the proposed reference to the Master, said he would look into the cases, and should be very glad to find, from *Esdaile v. Stephenson* downwards, that the authorities were consistent in principle, but he could not come to a conclusion on the point until he had examined them.

1849.
DE VISME
v.
DE VISME.
Argument.

The LORD CHANCELLOR:—

The question in this case is of some importance as regards the general practice of the Court, but does not present a question of any difficulty as to what, in justice, ought to be done, or what the rule ought to be. The difficulty arises from certain decisions that have taken place, inconsistent in principle, at least as to some of them, with other decisions; and those which appear to be nearest to that

Nov. 13th.
Judgment.

(a) 6 M. & S. 121.

(b) 1 S. & S. 122.

1849.
 DE VISME
 v.
 DE VISME.
 Judgment.

which is right in point of result, do not put the matter always on the same ground.

The simple case is this: in conditions of sale, a particular time is fixed for certain acts to be done, a particular time is fixed for the delivery of the abstract of title, and a particular time for payment of the purchase-money, or interest is to run upon the purchase-money if it be not paid at that time. It is quite obvious the intention of the parties was to have an opportunity, before the time came for the payment of the money (from which time the interest was to run), of seeing whether the abstract shewed a good title or not. If the abstract did shew a good title, then, according to the rule, the estate would become the property of the purchaser from the time at which the contract ought to be completed, and the money would be the property of the vendors, and thus the one would be entitled to the fruits of the estate, and the other to the fruits of the purchase-money. That is the ordinary rule, and that would be the practical effect of the rule in all cases where there is merely a time fixed for the performance of the contract, and nothing specific is said as to the time from which interest is to run. It is the ordinary case that a time is fixed for the performance of the contract; from that time interest is payable upon the purchase-money, and the purchaser is entitled to the rents and profits. Now, that happens to be particularly adverted to and recognised in, I believe, each of the cases which occurred before Sir *John Leach*, V.C. In *Esdaile v. Stephenson* (a), he in terms takes notice of the rule, and in *Paton v. Rogers* (b), and *Jones v. Mudd* (c), he does the same thing. Every one of those cases recognises the rule, and lays it down as the general rule of practice of the Court. In *Esdaile v. Stephenson*, Sir *John Leach* held, that where the parties had fixed a time from which interest was to run, the Court could not depart from the rule

(a) 1 S. & S. 122.

(b) 6 Mad. 256.

(c) 4 Russ. 118.

which the parties had so laid down for themselves. It does not appear very obvious why a contract which is specified in terms, and a contract which the law implies, though not specified, should make any substantial difference between the parties, the rule being perfectly established, that interest is payable upon the purchase-money from the time the contract ought to be performed. There being nothing special to take the case out of that rule, I cannot see why the rule, though not reduced into terms in the very words of the contract, is not in its nature to be considered part of the contract, the parties contracting according to the ordinary rules which regulate the question of interest between the parties. Why the parties specifying that which the law implies, should make any difference in their rights, does not well appear. It is true parties may contract themselves out of an implied rule, such as that where the law would imply the allowance of interest from a certain time; they may by special contract say that interest shall not be paid at that time, but at some other time; but in no case do I find a contract reaching this point—a contract saying (which no purchaser whatsoever would consent to) you are to pay interest from such a day, although you are prevented from performing your contract by the acts of the vendor; no purchaser did ever say it. I have no doubt the truth is, that in all these cases of unforeseen events, the expression “from any cause whatever” is always intended to exclude that which is not expressly provided for by the contract. The question is, whether a vendor who does not deliver his abstract shewing a good title, until a period long after the stipulated time, and does not perform his part of the contract, and therefore prevents the purchaser from having the benefit of his purchase until a later period, is to have the benefit of the contract against the purchaser. Nothing could be more unjust than so to hold; or, that a purchaser having contracted to pay 5*l.* per cent. upon his purchase-money (in almost all cases, of course, exceeding

1849.
 DE VISME
 v.
 DE VISME.
 Judgment.

1849.
 DE VISME
 v.
 DE VISME.
 —
Judgment.

the annual value of the property purchased), is to be liable to pay interest from the time contracted for, though the vendor has not performed his part of the contract by delivering an abstract, so as to enable the purchaser to have the benefit of the contract.

Now, there are two ways in which that may be met in argument, and upon principle: either by considering the case which has happened as not within the contract, and that the party never meant to contract that he would pay interest, although he is prevented having the benefit of his purchase from the default of the vendor; in which instance it would be the ordinary case of doing justice between the parties, an event having arisen which was not expressly provided for by the contract; or else it may be provided for (as the *Master of the Rolls* seems to have thought it ought to be provided for, in a case which was before him, —*Oxenden v. Lord Falmouth*(a)), that you are to pay your interest upon the purchase-money according to the terms of the contract with the vendor; but if the vendor has not performed his part of the contract, and has exposed the purchaser to damage—the damage being the difference between the interest and the income of the property—by not performing his part of the contract, and though that is a departure from the terms of the previous contract, which the Court would not regard in allowing a specific performance, yet in these cases the Court would regard it by giving to the purchaser compensation for the loss he has sustained by the non-performance of the whole contract by the vendor. If a vendor sells property under a description more favourable than properly belongs to it, or describes quantities different from those which the quantities really are, or professes to sell parcels of land not necessarily connected with the main body of the land, and he cannot make out a good title to the whole, the Court decrees per-

(a) 3 Sugd. V. & P. 118.

formance of the contract, but it does not do so on the terms upon which the parties entered into the contract. If the contract be for the whole estate—for all the different pieces of land—and if the Court finds that in substance the contract may be performed, it performs it, but it will not perform it leaving the vendor to the benefit of the error, and compelling the purchaser to pay the whole purchase-money, he not being able to obtain the whole property he contracted for. The Court performs the contract in those cases which are capable of compensation, by inquiring what the diminution in value is, from the circumstances which arise upon the investigation of the title, and so far, therefore, alters the contract as not to compel the purchaser to pay the principal money, because he has agreed to pay 10,000*l.*; but it says you shall pay 9500*l.*, or whatever other sum shall appear to be the value of the property, which you can get. With regard to the principal, there is no doubt about the course which the Court adopts: it will deduct from the principal money what may be necessary to put the purchaser in the situation he ought to be placed in; and on what principle is the Court not to deal with interest? The question here is, whether the Court is at liberty to deal with interest upon terms different from that contracted for. In all these cases of compensation the Court does deal with the principal; and is not the same rule to apply to interest? The parties agree to pay interest from a certain day. On what account did they do that? No doubt upon the condition of the vendor shewing a good abstract of title within a certain time. The purchaser could not be considered as paying his purchase-money before he received the abstract of title. If, therefore, the vendor is entitled to the interest upon the money from the time he contracted for it, why is he not in the same way to make compensation out of the purchase-money for default on his part? Where a party agrees to pay 5*l.* per cent. interest, it is always a great prejudice to a purchaser to pay it earlier than the time from which he

1849.
 DE VISMÉ
 v.
 DE VISMÉ.
 —
Judgment.

1849.

DE VISME

v.

DE VISME.

Judgment.

is to have the enjoyment of the property. No property purchased produces 5*l*. per cent. Such a course of proceeding is a benefit, therefore, to the vendor and a loss to the purchaser; and if it arises from the default of the vendor, is the vendor to get the benefit of his own wrong, and to profit by his own breach of contract? And is the Court specifically to perform a contract with all the disadvantages that a vendor imposes upon a purchaser, without giving the purchaser any compensation for the breach of contract? I should, indeed, be sorry to find that the authorities were so cogent as to compel me to follow such a rule; but I do not find such to be the effect of the authorities; and although the *Master of the Rolls*, in *Greenwood v. Churchill* (a), was evidently hampered by the rule laid down by his predecessor, before whom the point came for decision, still, when the case was argued a second time before him he saw the injustice of it; but being bound by the case of *Esdaile v. Stephenson* (b), to compel the party to pay the interest, he left it open to him to apply to the Court for compensation. It does not appear to me at all necessary that I should decide on which ground I think the purchaser entitled to be relieved; for they both lead to the same result: it is a mere question on controverted authorities, which is the true principle to put it upon. It is undoubtedly certain that justice requires the effect of the rule should be followed; and it is very immaterial to distinguish it as it respects compensation for the amount of interest otherwise payable, or as compensation to be paid to the purchaser by the vendor, that compensation being to be paid out of the very amount of interest which the purchaser, according to the contract, had to pay. None of the cases are directly in point except that of *Esdaile v. Stephenson* (b), and I have no doubt Sir *John Leach* there laid down the rule very distinctly. There are cases where there are very peculiar expressions used, such as "from any cause whatever," and in others, "from any

(a) 8 Beav. 413.

(b) 1 S. & S. 122.

cause whatever, except with the wilful default of the vendor," but there is not one of them in which the very case occurs which is the subject now for consideration, viz. whether the purchaser is to pay interest, notwithstanding the delay has been occasioned by the act of the vendor; nor has any authority been referred to which would lead to the conclusion as to what would be the result if such a contract were entered into. I have before said, it is not very likely it should occur; and I do not well see, if a party contracts for performance of the whole, why he should not be bound by it; but that cannot be considered as obligatory upon the purchaser, who cannot be supposed to look to delay arising from the non-performance of the very act which the vendor stipulated he would perform. When a person speaks of "from any cause whatever," he must mean some cause not provided for by the contract; the parties do not consider the probability of either one or the other breaking the contract, the vendor contracting to do a certain duty on a certain day, and the purchaser contracting on a certain day to found upon that stipulation the condition which, as between the parties, is the entire contract agreed to be performed by the vendor. However, I do not think it necessary to specify it in the order; it is quite sufficient that I should refer it to the Master to inquire from what time a good title was shewn, and direct the payment of the interest to commence from that time. Of course the income of the property will be regulated by the same rule.

1849.
 DE VISMÉ
 v.
 DE VISMÉ.
 Judgment.

Mr. Greene.—Will the reference, my Lord, be when a full abstract was delivered?

The LORD CHANCELLOR.—When such an abstract was delivered as would shew a good title. If there were any unnecessary abstract required to shew a good title, that might be vexatious on the part of the purchaser; the Master will judge of that.

1849.
 DE VISME
 v.
 DE VISME.
 —
Judgment.

[Here a discussion at some length occurred as to the right of the purchaser to claim compensation (over and above the 2*l.* 10*s.* per cent. which was received from the bank at *Worcester*, on the purchase-money) from the time when notice was given by the purchaser of its investment, up to the time when a good title was first shewn. At the conclusion his Lordship expressed himself as follows:—

My opinion is, that the vendors being in default, the delay having been occasioned by the non-performance of their part of the contract, they are not to exact from the purchaser the payment of interest until the time they put themselves right by shewing a good title on the abstract. The effect of that is to postpone the day stipulated in the contract for the time of the completion of the contract, until the time the vendors put themselves right, and shewed their title to be good on the abstract. The result, there is, that until such time there could be no demand made by the vendors for the payment, and therefore the interest, which was to stand in the place of that payment, had not commenced running. It did, however, run when the vendors shewed a good title, and not before. That is giving the purchaser compensation for the loss and injury which he sustained by the non-performance of the contract by the vendors; but the vendors are not, therefore, to make compensation for any loss not arising out of their contract; and the default on the part of the vendors did not render it necessary or proper for the purchaser to lay his money by, and make it unproductive, for the purpose of throwing the loss of that unproductiveness on the vendors. I think it is carrying the principle out strictly, to postpone the payment of the principal money till the time when a good title was shewn. The vendors will be entitled to the rents and profits up to that time, and the purchaser must pay interest from that time, and the Master must inquire and ascertain that time.

The Petitioners' costs on the petition before the *Vice-Chancellor* having been ordered by his Lordship to be paid, a question arose as to the costs of several parties beneficially interested in the fund in Court, who had been served with and appeared on the petition. It was suggested by the vendors' Counsel, that the fund was paid into Court without prejudice to the question existing between the vendors and purchaser : when

1849.
 DE VISME
 v.
 DE VISME.
 ———
Judgment.

The LORD CHANCELLOR observed, that the parties entitled to the fund could not be prejudiced by taking it out again. It was quite true the money in Court *primâ facie* was the property of those entitled to the estate; and those who made a claim on that fund, as the representatives of the purchaser did, were bound to give notice; and they could not, without giving notice to the parties beneficially interested, have any part of the fund out again. His Lordship afterwards added, that the point that had been discussed was a very proper one to be raised upon the state of the authorities; that the parties conducting the sale could not take on themselves to decide the point against the estate; and that all parties interested must have their costs out of the fund.

1849.

Nov. 21st &
24th.

SCARF v. SOULBY.

A testator, four years previously to his decease, assigned two policies of assurance effected by him on his life, for the benefit of a female with whom he had cohabited, and his four children by her. There was no allegation in the bill, which was filed on behalf of creditors to set aside the assignment, that the Plaintiff's debt was due at the time of the settlement, and there was no evidence of the state of the settlor's affairs, or of his being indebted at the date of the assignment, except an I. O. U. for 200*l.*, produced by the Plaintiff:—

Held, reversing the decree of the Court below, declaring the assignment void against creditors, that the proper course was, to direct inquiries before the Master, as to the debts of the testator at the date of the assignment, and the amount of his estate and effects at the same time.

THIS was a creditors' suit, and sought a declaration by the Court, that a voluntary settlement of the 7th December, 1842, executed by the testator, *John Milner*, four years previously to his decease, of two policies of assurance for 2250*l.* and 3000*l.* respectively, in favour of *E. Q.*, a female with whom he had cohabited, and his four children by her, was void and fraudulent against the Plaintiffs and the other creditors of the testator. Another suit had been instituted for the administration of the testator's estate. It appeared that the testator continued to cohabit with *E. Q.* until his death. No notice of the assignment of the policies of assurance was given to the insurance company with whom the policies had been effected, until after the testator's death. The only proof adduced on the part of the Plaintiffs, of the testator being indebted at the date of the settlement, was evidence of an I. O. U. for 200*l.*, given by the testator to one of the Plaintiffs, in 1841. On this cause coming on to be heard before the *Vice-Chancellor of England*, his Honor decreed against the validity of the settlement, relying in his judgment on the case of *Priest v. Parrot (a)*. The case is reported in 16 Sim. p. 344. The Defendants, *E. Q.* and her four children, now appealed from his Honor's decision.

Mr. *Stuart*, Mr. *J. Parker*, and Mr. *Younge*, for the Plain-

To set aside a voluntary settlement at the suit of creditors, it is not necessary to shew the actual insolvency of the settlor at the date of the settlement, but the mere existence of debt at that time will not be sufficient, *per se*, to render it void.

Observations on the authorities, commencing with *Lord Townshend v. Windham*, 2 Ves. sen. 10, and ending with *Townsend v. Westacott*, 2 Beav. 344.

(a) 2 Ves. sen. 160.

tiffs, contended that the authorities justified the decision of the Court below; that it was not necessary, in cases like the present, either to prove the insolvency of the settlor, or that he was largely indebted at the date of the voluntary settlement; but that, on the contrary, if a debt were due from the settlor at the date of the voluntary settlement, and remained due from him down to the time of the impeachment of the settlement, that was sufficient to render the settlement void against the creditors generally; and that the amount of the debt was immaterial.

The following cases, which were observed upon by the *Lord Chancellor*, in his judgment, were cited or referred to for the Plaintiffs: *Lord Townshend v. Windham* (a), *Richardson v. Smallwood* (b), *Russel v. Hammond* (c), *Walker v. Burrows* (d), *Stephens v. Olive* (e), *Kidney v. Coussmaker* (f).

Mr. *Bethell* and Mr. *Southgate*, for *E. Q.* and her four children, contended that the settlement was not *fraudulent*, within the meaning of the Statute 13 Eliz. c. 5; that it nowhere appeared, in the present case, that the settlor was embarrassed in his circumstances, or that the settlement disabled the settlor from the payment of the debts owing by him at the date of the settlement; that embarrassment, at the least, of the settlor's affairs, at the date of the settlement, was a necessary ingredient in cases like the present; but still, the settlor, even though embarrassed in circumstances at the date of the settlement, might still not be insolvent; that, in *Lord Townshend v. Windham* (a), where Lord *Hardwicke* spoke of a man being indebted at the date of the settlement, and afterwards dying indebted, that learned Judge had in view the same identical debts at

1849.
SCARP
v.
SOULBY.
—
Argument.

(a) 2 Ves. sen. 10.

(b) Jac. 552.

(c) 1 Atk. 15.

(d) 1 Atk. 93.

(e) 2 Bro. C. C. 90.

(f) 12 Ves. 136, and in a note to that case, *Montague v. Lord Sandwich*, p. 148.

1849.
 SCARF
 v.
 SOULBY.
 —
Argument.

both periods, and meant that the settlement must be of such a character as to deprive the settlor of the means of paying his just debts. It was added, that in the case of *Townsend v. Westacott* (a), the latest decision on the subject, the *Master of the Rolls* had decided, that the mere circumstance of the settlor being indebted at the date of a voluntary settlement executed by him, was not sufficient to render the same void against his creditors.

Mr. *F. J. Hall*, appeared for the Defendants, the executors.

Mr. *Stuart*, in reply.

Nov. 24th. The LORD CHANCELLOR:—

Judgment.

The bill in this case alleges the death of the testator in May, 1846, and that debts were due to the Plaintiffs at his death; and it then states a settlement of December, 1842, and alleges, “that the settlor at that time was insolvent or in embarrassed circumstances, or indebted to divers persons in considerable sums of money.” There is no allegation that either of the Plaintiffs’ debts was due at the time of the settlement, and there is no evidence that the testator was indebted at the time, except the document produced called an I. O. U. The decree declared the settlement void against creditors, and that the fund which was the subject-matter of it formed part of the testator’s assets; and the *Vice-Chancellor* stated as the ground of his decision, that the allegation “that the settlor was insolvent or embarrassed at the time,” was superfluous, and that it was enough to prove that he was indebted at the time. The word “indebted,” as used by Lord *Hardwicke* in *Lord Townshend v. Windham* (b), in *Russel v. Hammond* (c), and in *Walker v. Burrows* (d), must be considered as meaning

(a) 2 Beav. 340.

(b) 2 Ves. sen. 10.

(c) 1 Atk. 13.

(d) Id. 93.

that the testator owed some debts. It appears clear in the last case, that Lord *Hardwicke* referred to the language of the Statute 13 Eliz. c. 5, for he said, the settlement must be “to the end, purpose, or intent to delay, hinder, or defraud creditors;” and all those cases have treated the fact of debt merely as a means of proving that the case came within the provisions of the Statute. Accordingly, Lord *Kenyon*, in *Stephens v. Olive* (a), held that a debt secured by mortgage, though due at the time of the settlement, did not invalidate it; that the mere fact of a debt being due was insufficient to invalidate the settlement, and that it was quite immaterial whether it was secured by a mortgage or not. Property, therefore, on the same principle, at the time of a settlement, not included in it, and ample for the payment of the debts, would negative the fraudulent intent. In *Lush v. Wilkinson* (b), Lord *Alvanley* said, insolvency was necessary; but in *Richardson v. Smallwood* (c), Sir *Thomas Plumer* held it was not necessary to prove insolvency, if the settlor were largely indebted, the question being the intention to defraud creditors; and in *Townsend v. Westacott* (d), Lord *Langdale* puts the rule upon its true principle, as Sir *Thomas Plumer* had indeed done in *Richardson v. Smallwood*, holding that it was not necessary to shew insolvency, but that the mere existence of debt at the time of the settlement was not sufficient.

1849.
 SCARP
 v.
 SOULBY.
 Judgment.

In this case there is no proof of debt at the date of the settlement, viz., the 7th of December, 1842, unless the I. O. U. for 200*l.*, dated the 2nd of April, 1841, now produced by one of the Plaintiffs, be considered as establishing that fact. If it be, it will only prove that 200*l.* was then due, and not the state of the settlor's affairs at that time. This document is not stated in the bill, nor is there any allega-

(a) 2 Bro. C. C. 91.

(b) 5 Ves. 384.

(c) Jac. 552.

(d) 2 Beav. 344.

1849.
 SCARP
 v.
 SOULBY.
 —
Judgment.

tion of the same Plaintiff's debt (to which this document was supposed to relate) at the date of the settlement, and the Defendant could not possibly be prepared with any proof affecting that document. It is, therefore, impossible to support the decree upon any such evidence; and the only doubt I have had is, whether I ought to dismiss the bill, or to direct inquiries.

In *Lush v. Wilkinson* (a), there being no conclusive evidence, Lord *Alvanley* dismissed the bill, at the same time giving leave to the Plaintiff to file another. In *Kidney v. Coussemaker* (b), Sir *William Grant* directed inquiries, there being no evidence, because the Plaintiff had not had the proper opportunity of impeaching the settlement. In *Richardson v. Smallwood* (c), Sir *Thomas Plumer* adopted the same course, as the Plaintiff had attempted to prove the debt; and in *Townsend v. Westacott* (d), Lord *Langdale* directed inquiries, the evidence of the debt being, in that case, only admissions of the settlor, which were not evidence against those who claimed under the settlement. If I were to dismiss this bill, any other creditor might raise the question in another suit, so that the effect would only be unnecessary expense and delay; and the I. O. U., though, under the circumstances, not affording proof upon which any judgment ought to be founded, may, if it were necessary, well lay the foundation for inquiry. I propose, therefore, to refer it to the Master to whom the administration suit has been referred, to inquire what debts were owing by the settlor at the time of the execution of the settlement and at his death, and what, at the time of the settlement, was the amount of the settlor's property not included in the settlement.

I have gone through these cases, not from any doubt I

(a) 5 Ves. 384.

(b) 12 Ves. 136.

(c) Jac. 552.

(d) 2 Beav. 344.

entertained on the question, but because an accidental expression, falling from so great an authority as Lord *Hardwicke*, is made use of to found a theory which cannot possibly be supported. It would, indeed, lead to the most absurd conclusion; namely, that there is sufficient to invalidate a settlement, if you prove the mere fact of a debt existing at the date the settlement was made. That could not be the meaning of Lord *Hardwicke*, as has been supposed, nor could it possibly be the construction to be given to it; but that it was a fraud for the settlor to make a voluntary settlement, without regard to the means that would be left to him to pay his debts. It is no new rule—no new observation—and the matter was set right (Lord *Alvanley* having carried it rather too far) by Sir *Thomas Plumer*, and also by the present *Master of the Rolls*, and upon the well-known rule of the Court, that the mere fact of a debt existing at the time of the settlement is not enough *per se* to invalidate a settlement.

For the reasons I have stated, there is nothing in this case which would enable me to proceed upon the ground of the settlement being void; but I think there is sufficient to entitle the parties to an inquiry.

1849.
 SCARF
 v.
 SOULBY.
 —
Judgment.

1849.

April 28th. In the Matter of GAWAN TAYLOR, a Person of unsound Mind;

AND

In the Matter of THE YORK AND NORTH MIDLAND RAILWAY, (Bridlington Branch) ACT, 1845, and THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

The costs and expenses incurred under and incidental to an order of reference to the Master in Lunacy, to inquire into the propriety of a contract entered into by the committees of a lunatic with a Railway Company, for the sale of a portion of the lunatic's lands, were directed to be paid by the Company under the 80th sect. of the Lands Clauses Consolidation Act, 1845.

The sanction of the *Lord Chancellor* ought to be obtained in all cases, by the committees of a lunatic, to a contract for sale of any portion of a lunatic's land to a Railway Company.

BY an order of the *Lord Chancellor*, dated the 24th of November, 1848, and made in the above matters, on the petition of the committees of the estate and person of the lunatic, praying the investment of a sum of 212*l.*, the amount of the purchase-money of a piece of freehold land belonging to the lunatic, contracted to be sold on the 21st of May, 1846, to the York and North Midland Railway Company by the committees, it was referred to the Master in Lunacy to inquire and certify whether the contract was a proper contract, and beneficial to the estate of the lunatic, regard being had to the authorities contained in the above-mentioned Acts of Parliament for the taking of lands by the Company.

The Master in Lunacy having on the 3rd of February, 1849, certified that the contract was a proper contract, and beneficial to the estate of the lunatic, the committees thereupon presented the present petition, seeking the confirmation of the Master's report, the execution of the conveyance of the land to the Company, the investment of the purchase-money in 3*l.* per cent. Consolidated Bank Annuities, and all accumulations of the dividends to arise from such annuities, and that the costs, charges, and expenses of the Petitioners, of and incidental to the conveyance, and the investigation, deduction, and verification of the title to the land, and of obtaining and prosecuting the reference, and of the petition, and the order to be made

thereon, might be taxed and paid to the Petitioners by the Company.

1849.

In re
TAYLOR.

Mr. *J. J. H. Humphrys*, for the Petitioners, said, that the only question for consideration was, whether the costs and expenses occasioned by the reference to the Master, were costs within the meaning of the 80th sect. of the Lands Clauses Consolidation Act, 1845 (*a*); and he submitted that the words "and of all proceedings relating thereto," at the latter end of that section, would comprise such costs and expenses.

Argument.

Mr. *Prior*, for the Company, contended, that the order of reference to the Master was not a proceeding, the expense of which was contemplated by the 80th sect. of

(*a*) By the 80th sect. of the Lands Clauses Consolidation Act, 1845, it is enacted as follows, viz. "In all cases of monies deposited in the Bank, under the provisions of this or the special Act, or any Act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in *England*, or the Court of Exchequer in *Ireland*, to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertak-

ing; (that is to say) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such monies in government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of court of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants."

1849.

In re
TAYLOR.

Argument.

the Lands Clauses Consolidation Act, that Act giving the absolute power to the committees to enter into contracts, and being wholly silent as to the necessity of making any application on the subject, by the committees of a lunatic, to the *Lord Chancellor*, although the *Lord Chancellor* had laid down a rule that the committee of a lunatic must obtain the sanction of the *Lord Chancellor* in such a case.

The LORD CHANCELLOR:—

Judgment.

The expenses which have been incurred in this matter by the lunatic's estate, have been occasioned entirely by the proceedings of the Company, and the lunatic's estate will not be indemnified unless the costs of the reference be paid by the Company. The Company, indeed, might have thought it right, under the Act, to have incurred the expense of going to a jury, instead of entering into the present contract; in which case the committees could only act under the order of the *Lord Chancellor*. All the world ought to be aware that the sanction of the *Lord Chancellor* is necessary to be obtained, in the first instance, in cases like the present(a). As, however, the fund may at a future period be required to be invested in the purchase of land, it will be necessary to keep the Company before the Court, and for that purpose the fund must be invested in 3l. per cent. Consolidated Bank Annuities, to be carried to the *joint* account of the committees of the lunatic and the Company. The dividends must also be invested as they accumulate, to the like account, and the interest, and costs, charges, and expenses of the committees paid by the Company, in accordance with the prayer.

(a) Vide *In re Wade*, ante, p. 202.

1849.

In the Matter of MALLORIE, an alleged Lunatic.

April 21st.

IN this case, two petitions having been presented to the *Lord Chancellor*, praying a commission of lunacy, one on the part of the wife, and the other on the part of the mother of the supposed lunatic, a question arose which of the petitions should be first opened, when

Where two petitions are presented in the same matter, the one first presented is entitled to be first opened.

The LORD CHANCELLOR observed, that it would be proper to lay down some rule of practice for the future in such cases, and decided, that where several petitions appeared to have been presented in the same matter, the petition first presented should be the first to be opened.

Mr. *Malins*, for the wife of the alleged lunatic, accordingly opened her petition, which was the first presented, and also the first answered by the *Lord Chancellor*.

Mr. *Rolt* and Mr. *W. R. Ellis* appeared on the petition of the mother of the alleged lunatic.

Secretary of Lunatics' Office, Minute-book
for 1849, No. 35.

In the Matter of BROOKMAN, an alleged Lunatic.

April 21st.

IN this case two petitions had been presented to the *Lord Chancellor*, praying a commission of lunacy against the alleged lunatic, one on the part of two of the sons and a married daughter, and the other on the part of another married daughter of the alleged lunatic and her husband; both petitions were presented on the same day, and were answered by the *Lord Chancellor* on the same day. A question having arisen between Counsel as to the right to pre-audience on behalf of their clients,

Where two petitions are presented in the same matter, and answered by the *Lord Chancellor* on the same day, that which is first lodged in the Secretary's office, is entitled to be first opened.

1849.
 In re
 BROOKMAN.

The LORD CHANCELLOR determined to follow the rule he had laid down in the matter of *Mallorie*(a).

Mr. *Malins*, and Mr. *Prendergast*, accordingly, for the two sons and married daughter, who first presented their petition, opened the same.

Mr. *Rolt* and Mr. *Terrell* appeared in support of the other petition.

Secretary of Lunatics' Office, Minute-book
 for 1849, No. 35.

(a) Vide ante, p. 435.

ELLIOTT v. LYNE.

GIBBARD v. PIKE.

Nov. 20th.

Where two suits have been instituted in different branches of the Court, having relation to the same subject-matter, the Court will, as a general rule, direct the suits to be heard by the Judge in whose branch the first suit was instituted.

MR. *Elmsley* applied to the *Lord Chancellor* for an order for the transfer of one of the two above-mentioned suits to the list of causes of Vice-Chancellor *Knight Bruce*, before whom the other of the two causes was about to be heard. One of the causes had reference to the general administration of an estate, and the other to a claim against the general estate; when

The LORD CHANCELLOR observed, that the two causes must be heard by the Judge in whose branch of the Court the first suit was instituted; and added, that he should consider such to be a general rule for the future, unless special circumstances existed to induce his Lordship, in any particular case, to make a different order.

1849.

TAYLOR v. TAYLOR.

Nov. 23rd &
Dec. 4th.

IN the month of July, 1846, *Charlotte Cowper* and *Alexander Cowper* (an infant, by his next friend, the said *C. Cowper*), filed their bill against *John Taylor*, *Christopher Wallis*, *Frederick Silly Parkyn*, *Alexander Taylor*, and *Lydia* his wife, as Defendants thereto, stating the sale by the Defendants *J. Taylor*, *C. Wallis*, and *F. S. Parkyn*, of divers trust stocks, funds and securities of large amount, and praying in effect that those Defendants might be decreed to make good the proceeds thereof; and that an account might be taken of the trust monies, stocks, funds, and securities possessed or received by them; and that they might be decreed to make good the said trust funds and all loss occasioned by the application thereof; and that the last-mentioned Defendants might be removed from the trusteeship,

In a suit (*C. v. T.*) instituted by two of three parties entitled to the corpus of a trust fund after the death of their mother, the tenant for life (one of the Plaintiffs being an infant,) against the three trustees, who had been guilty of a breach of trust, (*L. T.*, the mother, being one of the Defendants) a decree was made, ordering the realization and payment of the misapplied

trust funds by the trustees. *J. T.*, one of the trustees, being in contempt of Court for disobedience to the decree, filed his bill against his two co-trustees, and *L. T.* and her three children, stating the decree in *C. v. T.*, and insisting, as against *L. T.*, that she was in fact the author of all the breaches of trust complained of in that suit, and had, as executrix of the testator, retained and misapplied to her own use certain parts of the testator's residuary estate, which ought to have come to the trust funds, and ought therefore to come in aid for the reimbursement of the trust estate, and that his co-trustees had imposed on him; and praying (*inter alia*) that he might be reimbursed, as far as might be, out of the interest coming to the tenant for life, from the consequences of the breach of trust of which he had been guilty through her co-operation; and generally, that he might be indemnified by the Defendants:—*Held*, that the second suit arose out of the exigency of the first suit, and embraced subjects not touched by the decree in the first suit, but consistent therewith, and was not in the nature of a bill of review, and ought not to be taken off the file by reason of the leave of the Court not having been previously obtained for the purpose of filing the bill.

It is not because there is something prayed for by a bill which cannot be granted, that the bill is to be taken off the file; but where the application is to take a bill off the file for irregularity, the matter to be considered is, whether it is inconsistent with the practice of the Court to allow such a bill to remain on the file.

In *Bainbrigge v. Baddeley* (a), the test suggested whereby to try a question of this nature was, whether, if the first suit had not been taken notice of by the second suit, the first could be pleaded in bar of the second, and it could only be pleaded in bar of the second, if the matters in the two suits were the same.

The ground of the decision in *Hodson v. Ball* (b) was, that the nature of the relief granted in the first suit, and of that prayed in the second suit, were such as could not co-exist.

Held, also, that the fact of the Plaintiff in the second suit being in contempt for disobedience to the decree pronounced in the first suit, was not an objection to the institution of the second suit, or ground for ordering a stay of proceedings in the second, until the decree in the former suit had been performed by the Plaintiff in the second suit.

(a) 2 Ph. 709.

(b) 1 Ph. 177.

1849.
 TAYLOR
 v.
 TAYLOR.
 —
Statement.

and new trustees appointed in their stead; and by an order made in that cause, dated the 9th August, 1847, the Defendants *J. Taylor*, *C. Wallis*, and *F. S. Parkyn* were ordered, on or before the 2nd of November then next, to pay into the Bank of England, in trust in the cause, the sum of 18,906*l.* 0*s.* 3*d.* By the decree afterwards made on the hearing of the cause, and dated the 15th November, 1848, the order of the 9th August, 1847, was continued, and it was ordered that the same Defendants should, on or before the 9th January, 1849, pay 26,274*l.* 2*s.* 9*d.* into the Bank of England, to the credit of the cause, or so much of the same sum as should not have been previously paid, in obedience to the order of the 9th August, 1847; and as against the Defendant *Taylor*, the bill was ordered to be taken *pro confesso*. The Defendant *J. Taylor* went abroad, and his property became sequestered under the process of the Court in that cause.

On the 30th June, 1849, the Defendant *J. Taylor* filed his bill against the Plaintiffs and his co-Defendants in the suit of *Cowper v. Taylor*, and against *William Cowper*, one of the children of *Lydia Taylor*, who was out of the jurisdiction of the Court, alleging at considerable length the fraudulent retention and application by *L. Taylor*, at the time of her second marriage with *A. Taylor*, to her own absolute use, of large portions of the testator *William Cowper's* residuary estate and effects, in which she, by the testator's will, (which was confirmed by a settlement made on her marriage with her present husband,) had only a life-interest, her children, the Defendants, by her former marriage, taking the principal on her death; and that the Defendant *L. Taylor*, from time to time after the death of the testator, and until and in 1838, was engaged in various speculations in mines and otherwise, and had employed the Defendant *C. Wallis* as her solicitor and agent therein, and particularly in the application or disposal of parts of the testator's

residuary estate, which had not been transferred or delivered to the trustees; and that such speculations were entered upon and conducted by *L. Taylor* as a *feme sole*, and independently of her husband, partly in her own name and partly in the names and by the means of the Defendants *C. Wallis* and *F. S. Parkyn*, and partly in the names of other persons. The bill stated a variety of circumstances, under which the Plaintiff, at the request of *L. Taylor* and *C. Wallis*, consented to sell some portions of the trust funds, in order that the proceeds of such sale might be invested at a higher rate of interest, upon a mortgage of a post obit bond, which the Plaintiff was advised by *C. Wallis* and *L. Taylor* was, and he therefore believed it to be, a proper security, and that the trust monies received by *L. Taylor*, *C. Wallis*, and *F. S. Parkyn*, were received by them under and by virtue of various powers, orders, and cheques which were signed by the Plaintiff, according to directions or instructions in that behalf given or sent to him by or on behalf of the Defendants *L. Taylor*, *C. Wallis*, and *F. S. Parkyn*, in divers letters written by them to the Plaintiff; and that the Plaintiff's signature thereto was obtained by means of representations made to him by the same Defendants, that such was required for the purposes of the trust. The bill then stated the proceedings in the suit of *Cowper v. Taylor*, and alleged, that since the making of the decree therein, the Plaintiff had discovered, and the fact was, that at the respective times of instituting the last-mentioned suit, and of the making of the said order and decree therein, the Defendants or some of them, with the privity and consent of the others, had been and were then in the actual possession and enjoyment of all the monies and property sought to be recovered by the said bill in the suit of *Cowper v. Taylor*, and which by the said order and decree were directed to be made good by the Plaintiff. The bill then charged (inter alia) that *L. Taylor* was liable to make good so much of the testator's residuary estate as had been received by her and applied to her own use, without the

1849.

TAYLOR

v.

TAYLOR.

Statement.

1849.
 TAYLOR
 v.
 TAYLOR.
 —
Statement.

intervention of the trustees, and that the interest, dividends, and annual income of the said residuary estate, during the life of *L. Taylor*, ought to be applied in recouping and making good to the testator's estate what had been so received and misapplied by her, and that the said Defendants ought to be decreed to indemnify the Plaintiff against all such liability and costs as might have been incurred by him in or in respect of the said suit of *Cowper v. Taylor*; and prayed that an account might be taken of the residuary estate of the testator *Cowper*, and of the manner in which the same had been dealt with by *L. Taylor*, as his executrix; and that such parts thereof as had not been actually transferred or paid to the trustees of the indenture of settlement might be paid to the Plaintiff, and *C. Wallis*, and *F. S. Parkyn*, upon the trusts thereof; and that it might be declared that the interest of *L. Taylor* in the residuary estate was liable to recoup to the said testator's estate what had been so misapplied by her, and that an account might be taken of the dealings and transactions of *L. Taylor*, *C. Wallis*, and *F. S. Parkyn*, in respect of the same trust monies and funds; the Plaintiff being ready to join in such account in respect of his receipts and payments; and that the Defendants, or such of them as to the Court should seem just, might be decreed to indemnify the Plaintiff against the loss, liability, costs, and expenses that had been or might be incurred by him in consequence of the institution of the suit of *Cowper v. Taylor*, in the manner aforesaid, and of the decree and order made therein; and that a receiver might be appointed of the trust monies and property, and to collect the rents, profits, and annual produce thereof; and that the Defendants *L. Taylor*, *C. Wallis*, and *F. S. Parkyn*, might be restrained from receiving the same or any part thereof.

A motion having been made on behalf of *L. Taylor* to the *Master of the Rolls*, to take the bill off the file of the Court, or that the Plaintiff might be ordered not to take

any further proceedings in his suit until he had performed the decree pronounced against him in *Cowper v. Taylor*, his Lordship, on the 3rd August, 1849, refused the same. The motion was now renewed before the *Lord Chancellor*.

1849.
TAYLOR
v.
TAYLOR.

Statement.

Mr. *Bethell* and Mr. *Kinglake* appeared in support of the motion.

Argument.

The bill being in the nature of a bill of review, ought not to have been filed without the leave of the Court to file the same, having been first obtained by the Plaintiff. The object of the Plaintiff's bill is, in reality, to subvert all that has been done in the suit of *Cowper v. Taylor*, for he sues in the same character, and relies on the same grounds as he set up as a Defendant in the suit of *Cowper v. Taylor*, and he is at this moment guilty of a contempt of Court, by reason of his disobedience to the decree in that suit. The question for determination is, whether the Court will permit such a strange abuse as the present, namely, that a party being guilty of a contempt of Court in not obeying its decree, shall go abroad to avoid compliance therewith, and then institute a suit having for its object his escape from the existing decree pronounced by the Court against him. At all events the present suit ought to be stayed until the decree in the former suit of *Cowper v. Taylor* has been obeyed by the Plaintiff. The *Master of the Rolls* must have misunderstood the Plaintiff's bill, when he stated in his judgment that it did not seek to discharge the Plaintiff from his liability, or to get rid of the declaration and order of the Court, or the process of contempt which was in force against him in the suit of *Cowper v. Taylor*. The proper criterion of what constitutes a bill of review is to be

1849.
 TAYLOR
 v.
 TAYLOR
 —
Argument.

found in *Bainbrigge v. Baddeley* (a); and with reference to contempt, it is clear from the cases of *King v. Bryant* (b), and *Wilson v. Bates* (c), that if a Plaintiff, having issued process of contempt against a Defendant, proceeds in the prosecution of the cause during the existence of the contempt, the contempt is waived. [*Partridge v. Usborne* (d), and *Hodson v. Ball* (e), were also relied on in support of the motion.]

Mr. *Stuart* and Mr. *Freeling*, in support of the motion.

In breaches of trust, where there is a plurality of trustees, the decree no doubt binds all the trustees absolutely and equally, and the Plaintiff here does not by his bill question his liability, or impeach the decree in *Cowper v. Taylor*; in short, the Plaintiff by his bill seeks nothing inconsistent with that decree. He simply asks for an account to be taken of the *whole* of the trust funds, and that *L. Taylor* may be declared liable to make good the sums misapplied by her, so far as her life-interest extends. The present suit will be found to comprise the whole of the trust property of the testator *Cowper*, whereas the suit of *Cowper v. Taylor* only embraces a *portion* of it. In *Bainbrigge v. Baddeley* the validity of the will was put in issue in the first suit for a very different purpose from that for which it was put in issue in the second suit. As to the question of proceedings being taken whilst in contempt, this application is made in a different and distinct suit from that in which the process of contempt has issued. Indeed, the Plaintiff's suit is in its nature an original one.

[On the point of contempt the following cases were cited

(a) 2 Ph. 705; vide pp. 708, 709.

(b) 3 My. & Cr. 191.

(c) Ibid. 197.

(d) 5 Russ. 195.

(e) 1 Ph. 182.

in opposition to the motion:—*Clark v. Dew* (a), *Dalston v. Coatsworth* (b), and *Barnesly v. Powel* (c).]

1849.
TAYLOR
v.
TAYLOR.
—
Argument.

[The LORD CHANCELLOR.—I understand the Plaintiff's case to be, that his bill does not interfere with the decree pronounced in the suit of *Cowper v. Taylor*.]

Mr. *Bethell*, in reply, insisted that the relief sought in the second suit, if granted, would amount to a reversal of the most material part of the decree pronounced in the first suit, or at least suspend the effect of that decree.

The LORD CHANCELLOR:—

The first object of the application in this case was to take the bill off the file; the second, that the Plaintiff might not be permitted to proceed in the suit which he had instituted, until he had performed the decree in another cause. Two questions were raised, first, whether the second bill was a bill irregular in its frame, being a supplemental bill in the nature of a bill of review; and the other was, whether it was competent for the Plaintiff in the second suit, who was a Defendant in the first, and had not performed the decree in that suit, and was in contempt for not performing it, to file the second bill?

Judgment.

The first question can only be ascertained by an examination of the bill itself. I have therefore been under the necessity of reading the bill, and it is very long, but leaves no doubt on my mind, that the *Master of the Rolls* was right in the view he took of the case.

(a) 1 Russ. & My. 103.

(b) 1 P. Wms. 733.

(c) 1 Ves. sen. 119.

1849.
 TAYLOR
 v.
 TAYLOR.
 ———
Judgment.

In order to try whether a supplemental bill is in the nature of a bill of review, and therefore requires the leave of the Court before a party can be permitted to file it, the first question is, whether it impeaches or is inconsistent with the decree already made? Now, this matter has come before me twice (indeed more than twice), but two cases have been particularly referred to, in which that sort of question has arisen. The first was *Hodson v. Ball*(a), which was cited as shewing that the bill in this case was a bill which the party could not be permitted to file, without the leave of the Court. The case of *Hodson v. Ball* appears to me to be as different from the present case as any two cases can be. There had been a decree in that case for an ordinary account, and the decree as it stood, laid down the principle upon which that account was to be taken. The Plaintiff in that suit afterwards filed a supplemental bill, stating that he had discovered matter since the original decree was pronounced, which entitled him, not to the account which he had obtained, but to an account which he had not obtained, and which he asked for by the second suit, namely, stringent relief against the executor, not for what he had received, but for what, but for his wilful default, he might have received; a mode of taking accounts quite distinct from the other, and a nature of relief which cannot co-exist. Though one includes the other, yet the relief prayed and obtained by a decree charging wilful default, is a very different thing indeed from a bill merely praying the ordinary account; and on that ground I was of opinion that the second bill sought, in fact, an alteration in the decree already pronounced, and therefore the party was not at liberty to file a bill praying a species of account so different from the account which he had already had a decree for, without the leave of the Court. The other case referred to

(a) 1 Ph. 177.

was *Bainbrigge v. Baddeley*(a). In that case I suggested a test which certainly, if correct, must be a rule which will at once decide the question, and that was as follows, viz. whether, if the first suit had not been taken notice of by the second, the first could be pleaded in bar of the second? It could only be pleaded in bar of the second, if the matters were the same. It is impossible to hold that the matters in these two bills are the same. As the rule which I laid down, and which I find in the cases referred to, is a rule which I see no reason to depart from, it remains to be seen how far that rule is applicable to the present case. Here is a party, a trustee of a trust fund under which he was not originally a trustee, but became such afterwards; he was, in fact, and now is, a trustee of a trust fund which was subject to a covenant in a marriage settlement; to the effect, that all the residuary estate to which the wife was entitled, should be settled so that she should have a life estate therein, and her children should take the *corpus* after her death; and the present Plaintiff in the second suit was a Defendant in the first suit, which was instituted by two of the children of the wife by her first marriage, praying for an account and investment and security of the trust fund. Now, the trust fund consisted, in its original description, of the residue of the testator's, *Couper's*, estate; but the bill alleged certain sums to have been realised and vested in the names of the trustees, and that an admitted and acknowledged trust was thereby constituted. The two Plaintiffs, one of them being an infant, filed a bill, and nothing which had taken place, or could take place, between trustee and *cestuis que trust*, could affect the rights of the infant. There were three trustees, of whom *John Taylor*, the sole Plaintiff in the second suit, was one, and the bill prayed for the execution of the trusts, and the security and investment of the trust funds. Against

1849.
TAYLOR
v.
TAYLOR.
—
Judgment.

(a) 2 Ph. 709.

1849.

TAYLOR

v.

TAYLOR.

Judgment.

that claim no answer was or could be made, because so far as the trust funds have been realised and have come to the hands of the Defendants, there is a clear trust for the children, and no dealing of the tenant for life or the trustees of the tenant for life, could interfere with their right to have the trust funds realised and secured. That decree, therefore, against the three trustees was a matter of course, the moment it appeared the funds in question did, in fact, constitute part of the trust. The decree, therefore, is simply a decree on the part of the Plaintiffs in the first suit, ordering the payment and investment and realization of the trust funds. Then the Defendant *John Taylor*, one of the trustees, files the second bill.

Now, the question to be considered is, whether the second bill be or be not consistent with the provisions of the decree pronounced in the first suit? The second bill assumes and is founded, in fact, upon the Plaintiff's liability under that decree. *John Taylor*, the Plaintiff in the second suit, says he is a trustee, and states in the bill in the second suit that there has been a decree pronounced against him in the first suit, ordering him to realize the trust-funds, which he does not and cannot dispute, because the infants are not affected by anything that has transpired; but he insists as against the tenant for life that she was, in fact, the author of all the breaches of trust complained of.

[Here Mr. *Bethell* observed, that only one of the Plaintiffs in the first suit was an infant at the time of the filing of the bill in that suit, and that that infant had since attained age.]

The LORD CHANCELLOR.—It comes to the same thing. One is as good as a hundred, because there is a party against whom no allegation can be made as having been a

party to a breach of trust, nor am I aware of any allegation in the second bill of that child being a party to the breach of trust.

[Mr. Bethell.—Oh yes, my Lord.]

The LORD CHANCELLOR.—Well, it is not material to the case; for if there be one infant, it is quite enough to maintain a decree, and make it impossible to set up such a defence in answer to that decree. The trustee *John Taylor* says in his bill, as against the tenant for life, “you are the author of all these breaches of trust; you, my co-trustees, have imposed on me; I gave too much credit to your representations;” of course making the best case he can for himself; but the foundation of the suit is, that he, *John Taylor*, may be reimbursed, as far as he can, out of the interest coming to the tenant for life, from the consequences of the breaches of trust of which he has been guilty, and, as he says, through the co-operation, if not by the active agency, of the tenant for life. That is one object of the suit. But there is another, which is not touched by the original suit. He says, “the whole trust rides over the whole residuary estate; you, *Lydia Taylor*, are the personal representative of the original testator *Cowper*, and therefore I, as representing the trust estate, which by the covenant was to be made to consist of all the residuary estate, now say, there are certain parts of the residuary estate which ought to have come to the trust funds, but which you have yourself retained and misapplied to your own purposes, and which therefore ought to come in aid for the reimbursement of the trust estate.” Is it not competent to the trustee to file a bill for that purpose, making all the *cestuis que trust* parties to the suit? It has no connexion whatever with the other suit. Of these two grounds of relief, therefore, one is quite unconnected with the other, although connected with the other suit; and the other

1849.
TAYLOR
v.
TAYLOR.
—
Judgment.

1849.
 TAYLOR
 v.
 TAYLOR.
 Judgment.

ground, though connected with the other suit, does not dispute the decree pronounced therein; on the contrary, the necessity of the second suit arises and grows out of the exigency of the first.

There are indeed comprised in the prayer of the second bill, certain matters which it may be difficult at present to premise or understand how the Plaintiff can properly bring forward, and which may in one sense be considered, in the very extensive way in which relief is prayed with reference to them, inconsistent with the decree pronounced, namely, the prayer to be indemnified not by the tenant for life alone, but generally by the Defendants, including the Plaintiffs in the first suit. It is not because there is something prayed for by a bill, which cannot be granted, that the bill is to be taken off the file; but where the question is as to taking the bill off the file on the ground of irregularity, the matter to be considered is, whether it is inconsistent with the practice of the Court to allow such a bill to remain on the file. A party may pray that which he cannot obtain, if it be not inconsistent with the former decree; but if the bill itself be not informal, its being put on the file, without the leave of the Court, cannot support a motion of this kind.

[*Mr. Bethell.*—There is a fourth point, viz., the allegation that the Plaintiffs in the first suit are in possession of the property created by the misapplication of the trust funds. There was no infant when the first decree was made; the sole infant had then attained his age, and all of them are now sued as adults upon that allegation].

The LORD CHANCELLOR.—That may be all very well; but if they are in possession of the trust fund, supposing they had obtained it through the mother, it would not in the least relieve the Plaintiffs from the suit. If they derived title

through another person, if they had been themselves parties to a breach of trust, no doubt a case might have been made, if they had been adults at the time the breach of trust was committed. I do not recollect any allegation in the bill that they are infants.

1849.
TAYLOR
v.
TAYLOR.
Judgment.

[*Mr. Bethell*.—The allegation on the present bill is, that the money was irregularly invested and taken, and that the Plaintiffs in the first suit were in possession of those improper securities at the time they obtained their decree.]

The LORD CHANCELLOR.—So they might; and yet if they were not parties to the breach of trust, whether they got it through the mother or any other channel, would not affect the question. I am not aware of there being any allegation that the breach of trust was through their instrumentality or agency at the time they were adult.

[*Mr. Bethell*.—There is their adoption and taking the property. It is put thus, viz., that the money having been misapplied, the Plaintiffs have deliberately taken the property produced by the misapplication, and notwithstanding that proceeding, have obtained a decree for payment of the whole of the money into Court. Now, that they could not have, as long as they chose to retain the property produced by that misapplication.]

The LORD CHANCELLOR.—That may be an answer to such part of the decree, if the fact be that they were incapacitated from receiving the money, but that will not justify an application to take a bill off the file because it has some other object. I before said, that having some part which could not be maintained, is no answer to an application of this sort. The bill must be altogether irregular, and not merely ask for something that cannot be maintained. I have before observed, that there are parts of this bill

1849.
 TAYLOR
 v.
 TAYLOR.
 —
Judgment.

which are not touched by the decree in the original suit. If it touches the original decree in part, that may be considered when the cause is heard; it cannot be a ground for treating this as a supplemental bill in the nature of a bill of review, when it has other objects which are perfectly consistent with the decree in the original suit.

I am very clearly of opinion, therefore, without going into the details, and without saying every part prayed is free from objection, that there is no ground for the present motion to take the bill off the file, on the ground of its being a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of the Court.

I am of opinion that this bill, filed by *John Taylor*, was properly filed, without the leave of the Court, although there may not be one word of truth in the statements, and nothing may result from the pleadings.

Then, as to the other objection, that there is a decree against the Plaintiff, which he has not performed, and that he is in contempt for such non-performance: I do not apprehend that to be any objection; I have had to consider the case of *Wilson v. Bates* (a), and the conclusion to which I came there was, that Lord *Bacon's* Order did not reach such a case.

I am of opinion that the application fails on all its grounds, and must be refused with costs.

Mr. *Bethell*.—The costs to be paid by us on this appeal, your Lordship will probably direct to be set off against those due to us from the other side?

The LORD CHANCELLOR.—Yes, they must.

(a) 3 My. & Cr. 197.

Mr. *Bethell*.—Your Lordship gave me leave to give another notice of motion, in the event of our being unsuccessful; namely, that the bill may be transferred from the list of causes of the *Master of the Rolls* to that of the *Vice-Chancellor of England*. The *Master of the Rolls* said, it might be the duty of the Court, if the parties did not agree to carry it to the *Vice-Chancellor of England*, to remove it by authority.

1849.
TAYLOR
v.
TAYLOR.
—
Judgment.

Mr. *Stuart*.—Before Mr. *Bethell* proceeds with the application to transfer the present suit to the Court of the *Vice-Chancellor of England*, your Lordship will permit me to advert to the question of set off of the costs. Now, the costs in the other suit are joint costs, to be paid by my client and other individuals, and probably your Lordship will hardly think it right, that the costs of this appeal motion, in which the Appellants are unsuccessful, should be borne by my client, who is only liable jointly for the costs in the other cause.

The LORD CHANCELLOR.—He is liable for the whole costs; and from the position in which he has placed himself, I cannot enable him to receive costs.

After hearing Mr. *Stuart*, as to the transfer of the present suit to the *Vice-Chancellor of England*, the *Lord Chancellor* said, that, on the ground of expediency, the two suits being so closely connected, coupled with the strong opinion expressed by the *Master of the Rolls* in favour of the proposed transfer, he should direct the same to be made.

1849.

Dec. 3rd. THE CORPORATION OF BERWICK-UPON-TWEED
v. MURRAY.

Where the Plaintiffs set up a title to a fund deposited with a Scotch bank in the name of the Defendant, who denied the Plaintiffs' title, and they were not in a position to move for the payment of the fund into Court, or for an injunction to restrain the transfer of it, the Court refused to order the Defendant, on motion, to leave the deposit-receipt for the fund with the Clerk of Records and Writs, when the effect of such an order would be to deprive the Defendant of the power to deal with the fund in question.

THIS was a motion to vary an order made by the Vice-Chancellor of England, on the 17th of November, 1849, by which it was ordered, that the Defendant *William Murray* should leave with the Clerk of Records and Writs the several deeds and documents admitted by his answer to be in his possession, with liberty for the Plaintiff to inspect the same, and take copies of them; and the Record and Writ Clerk was to produce the same before the Examiner, and at the hearing of the cause. *W. Murray* now applied to the Lord Chancellor that this order might be varied, by excepting a "deposit receipt, dated the 27th of August, 1849, from the branch of the Commercial Bank of Scotland, at Eyemouth, for 2240*l.* 11*s.* 3*d.*"

In 1842, *W. Murray*, together with three other persons, had joined with the treasurer of the borough of *Berwick-upon-Tweed*, in giving a bond for the due performance by the treasurer of the duties of his office. The amount to be recovered under the bond was limited, as far as regarded the sureties, to the sum of 2000*l.*

In 1848 the treasurer was displaced, and he was then indebted to the borough in a sum exceeding 3800*l.*

In October, 1848, the corporation of *Berwick-upon-Tweed* filed a bill against the treasurer and his sureties, to have accounts taken of monies received and paid by him as treasurer of the borough, and to obtain payment of the balance; and in August, 1849, they filed a supplemental bill, in which they alleged that the treasurer had given to *W. Mur-*

ray a sum of 2000*l.*, which, in fact, formed part of their monies in his hands; and they prayed that that sum might be delivered over to their new treasurer.

W. Murray stated in his answer, that in September, 1848, the town-clerk informed him of the state of the treasurer's accounts, and *W. Murray* immediately required from him some security, by way of indemnity against the monies which he might be called upon to pay under his bond. The treasurer thereupon delivered to him a deposit-receipt on a branch bank of the British Linen Company, for a sum of 2300*l.*, which had been deposited in that bank by *Mrs. J. J. Murray*; and in March, 1849, having got it indorsed by *Mrs. Murray*, he received the money due upon it, and afterwards placed it in his own name with his own bankers, and the greater part of it still remained in their hands.

The bankers gave him a deposit-receipt for this sum in the following form:—

“Branch of the Commercial Bank of *Scotland*,
Eyemouth, 27 August, 1849.

“2240*l.* 11*s.* 3*d.*

“Received from *William Murray*, Esquire, of *Marshall Meadows*, Two Thousand Two Hundred and Forty Pounds, Eleven Shillings, and Three Pence sterling, which is placed to his credit, on deposit-receipt with the Commercial Bank of *Scotland*.

“*THOMAS BOWHILL*, Agent.

“No. $\frac{17}{181}$ Entered, *JOHN FORRESTER*, Accountant.”

W. Murray denied by his answer, that the 2300*l.* given to him by the treasurer, formed any part of the monies of the borough, and insisted that it was the proper mo-

1849.
THE
CORPORATION
OF
BERWICK-
UPON-TWEED
v.
MURRAY.
Statement.

1849.
 THE
 CORPORATION
 OF
 BERWICK-
 UPON-TWEED
 v.
 MURRAY.
 ———
 Statement.

nies of the treasurer. He also admitted by his answer, that he had in his possession sundry documents, including the deposit-receipt in question, which last-mentioned document he insisted that he was not bound to produce: and he also contended, that he was, either by *laches* on the part of the corporation or otherwise, discharged from all liability as surety under the bond.

The corporation had commenced proceedings against W. Murray in the Court of Session, in Scotland, and had attached all his money and effects in the hands of his bankers, at Eyemouth.

Argument.

Mr. Rolt and Mr. Lewin, in support of the motion.—The different points which were comprised in this order of the Vice-Chancellor would formerly have been the subject-matter of three distinct orders. The right of a Plaintiff to have a document produced, and to take copies of it, might stand on very different grounds from his right to have it produced before an Examiner, or at the hearing of the cause. The object of this order was to tie up the property to which the deposit-note related, and it operated as an injunction to prevent the Defendant from disposing of it, and was as effectual as an order to pay the money into court. If the Plaintiffs were entitled to have the amount paid into court, a distinct order for that purpose ought to be applied for; but if they dare not risk such an application, if made in a direct way, they were not entitled to the benefit of it by the indirect mode of requiring the documents to be left with the Clerk of Records and Writs. If it was not produced at the hearing, the Plaintiffs might read a copy of it as secondary evidence.

Mr. Craig, in support of the Vice-Chancellor's order.—

The order is in the usual form, and the right of the Plaintiffs to the inspection of the documents is not disputed; but the notice of motion seeks to discharge the order entirely as to this deposit-receipt. The late treasurer gave to *W. Murray* a sum of money as an indemnity, and the corporation, being bond creditors, were entitled to the benefit of any collateral securities given by the principal debtor to indemnify his surety. That was decided in *Maure v. Harrison* (a). If the money belonged to *Mrs. Murray*, that circumstance would not protect it: *Wright v. Morley* (b). The only means by which the Defendant could protect himself against producing the document, would be by shewing that it does not relate to the title of the Plaintiffs: *Smith v. The Duke of Beaufort* (c).

1849.
THE
CORPORATION
OF
BERWICK-
UPON-TWEED
v.
MURRAY.
—
Argument.

The LORD CHANCELLOR:—

The application of the Plaintiffs was, in effect, a motion for the payment of the money into court. I cannot make out of what use the document can be, except for that purpose, after the Plaintiffs have seen it and taken a copy of it. The process of this Court, for production of documents, is used in order to enable a party who is interested in them to obtain justice; and at the same time the Court will also endeavour to prevent the party against whom the order is made from sustaining any injury. There are no orders which are so much in the discretion of this Court, as orders of this description, and they are not to be extended against the Defendant beyond what necessity requires. This is money which was in the hands of *W. Murray*, and which the party cannot have control

Judgment.

(a) 1 Eq. Cas. Abr. 93.

(b) 11 Ves. 12.

(c) 1 Hare, 507.

1849.

THE
CORPORATION
OF
BERWICK-
UPON-TWEED
v.
MURRAY.

—
Judgment.

over without this receipt. It is therefore like a bank note. The Plaintiffs claim title to the 2300*l.*, and say, "what we claim is in the hands of the Defendant, and is now represented by that note." They cannot make out a case to have the money paid into court, but they say, we do not seek that, but we ask that the note may be brought into court. The money is not under the control of the party who has the note, if you take the receipt away from him. The Plaintiffs thereby deprive the Defendant of the use of the money, which they have no right to interfere with. If they require the documents merely to prove their case, they shall have all they want for that purpose: but they shall not, under that pretence, deprive the Defendant of the control over that sum of money which they admit that they have no claim to require him to pay into court.

An order was made for the production of the deposit-receipt, at the office of the town clerk of *Berwick-upon-Tweed*, within a week, with liberty for the Plaintiffs to take copies.

1849.

THE ATTORNEY-GENERAL v. MUNRO.

May 4th.

A DECREE had been made in accordance with the prayer of this information, and the decree had been affirmed by the *Lord Chancellor*, upon appeal, with costs (a). The decree had reserved the question, whether the Plaintiffs and Relators should, out of any fund, be allowed any additional costs. The original hearing had occupied four days. Mr. Russell and Mr. Little appeared in support of the information and bill, and Mr. Rolt, Mr. Cowling, and Mr. Selwyn, for the Defendants. On the hearing of the appeal, Mr. Bethell appeared for the Relators and Plaintiffs, in addition to Mr. Russell and Mr. Little. The costs, as taxed, exceeded 400*l.*, and more than 200*l.* were occasioned by the employment of a third Counsel. In taxing the costs, which the Appellant had to pay to the Respondent, the Master had allowed the Respondent the costs which were occasioned by the employment of three Counsel. The Appellant presented a petition to Vice-Chancellor Knight Bruce, praying that the Master might be ordered to review his taxation, but his Honor concurred with the Master, and dismissed the petition, with costs. The case was now brought before the *Lord Chancellor*, upon an appeal from that decision.

The general rule, that the costs of two Counsel only ought to be allowed in taxation, as against an opponent, will seldom be departed from, and applies particularly to cases heard on appeal.

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Statement.

Mr. Rolt and Mr. Selwyn, in support of the petition, cited *Smith v. The Earl of Effingham* (b), as shewing the general rule that the costs of two Counsel only were allowed on taxation; and insisted that this rule was never

Argument.

(a) See 2 De G. & S. 122.

(b) 10 Beav. 378.

1849.
 {
 ATT.-GEN.
 v.
 MUNRO.
 —
 Argument.

departed from except in particular cases, as in *Carter v. Barnard*(a), where the Counsel who had drawn the pleadings had been made a Queen's Counsel, and had a brief in addition to the leading Queen's Counsel and a junior Counsel: *Downing College case*(b).

Mr. *James Russell* and Mr. *Little*, contra, insisted that there was no such rule as was contended for on the other side, and that it was altogether a matter of discretion whether the costs of more than two Counsel ought to be allowed; that that was the rule laid down by Mr. Justice *Bayley*, in *Morris v. Hunt*(c); that, in taxing the costs of an appeal before the House of Lords, the costs of three Counsel would be allowed where the nature of the case rendered it proper to retain three Counsel, although two only were allowed to address the House; and that the magnitude of the present case warranted the conclusion at which the Master had arrived.

[*Sharp v. Ashby*(d), *Friend v. Solly*(e), *Nichols v. Harlam*(f), and *Attorney-General v. The Drapers' Company*(g), were also cited.]

Mr. *Rolt* replied.

The LORD CHANCELLOR:—

Judgment.

There is no question as to the general rule, that the costs of two Counsel only ought to be allowed on taxation,

(a) 16 Sim. 157.

(b) 3 My. & Cr. 474.

(c) 1 Chit. 544.

(d) 12 M. & W. 732.

(e) 10 Beav. 329.

(f) 15 Sim. 49.

(g) 4 Beav. 305.

as against an opponent. The question is, whether this case forms an exception.

1849.
 ATT.-GEN.
 v.
 MUNRO.
 ———
 Judgment.

With regard to the decision of the *Master of the Rolls*, in the *Attorney-General v. The Drapers' Company*(a), the question there was, whether the costs of the *Attorney-General*, who had not attended at the hearing of the information, ought to be borne by the Defendants, in addition to the costs of the two Counsel by whom he was represented. The *Master of the Rolls* thought that the *Attorney-General* stood in a different position from other parties, and for that reason he allowed, on taxation, the costs of the *Attorney-General*, as well as of the other two Counsel. That decision cannot govern this case.

In *Smith v. The Earl of Effingham*(b), the point arose which occurs here, and in that case the *Master of the Rolls* lays down a rule which is applicable to all cases, viz.: that two Counsel are all that ought to be allowed. The question is, not whether a party may employ two or more Counsel for himself at his own cost, but whether it is just that the party who fails ought to pay more costs than are reasonably incurred by his opponent. I do not say that there are not cases in which a party might be allowed the costs of more than two Counsel; but that is the general rule, and it seems to me to be more applicable to this Court than to any other, because the Counsel are more familiar with the case than at the original hearing; the discussion is often reduced to fewer points, and the parties do not require so many Counsel. The case of *Morris v. Hunt*(c), at Nisi Prius, is not in the least applicable. So far as regards the discussion of the case, I always find that two Counsel give me all the information which can with advantage be

(a) 4 Beav. 305.

(b) 10 Beav. 378.

(c) 1 Chit. 544.

1849.
ATT.-GEN.
v.
MUNRO.

addressed to the Court, and that more are not at all necessary for the assistance of the Judge, nor are more allowed to be heard in the House of Lords. I cannot think that there was, in this case, any necessity for the employment of three Counsel. It does not appear to me that this is at all a case of such a character as to render it an exception to the ordinary rule, or to justify a departure from the usual practice of the Court. There must be some discretion left to the Taxing Master, which, however, it is very difficult for him to exercise, because he knows nothing of the particulars of the case till he is called on to tax the costs. If he be influenced by the quantity of papers, that is not enough to enable him to form any correct judgment of the importance of the contents, or how far it was matter which might safely be left to two Counsel; but that is the only mode in which he can dispose of it. As a general rule, it seems to me that two Counsel are all which are necessary. I must, therefore, make an order that two Counsel only were required in this instance, and refer it back to the Master to review the taxation.

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1849.

March 16th,
17th, 21st,
23rd, 28th,
29th, & 30th.

STEWART v. FORBES.

AT the hearing of this cause, before the *Vice-Chancellor of England*, his Honor dismissed the bill, with costs. The form of that decree was as follows: "*The parties having consented* that the matters in question in this cause shall be decided by the Court, without directing an issue, this Court doth order that the Plaintiff's bill do stand dismissed out of this Court, with costs." From that decision the Plaintiff presented his petition of appeal to the *Lord Chancellor*.

On the general appeal coming on to be heard, on the 18th of November, 1848, before the *Lord Chancellor*, his Lordship observed, that by the form of the order made by the *Vice-Chancellor*, the case appeared to have been dealt with in the Court below as a matter of arbitration, the form of the order of the *Vice-Chancellor* implying that an issue ought to have been directed by his Honor; and leave was given by his Lordship to apply to the *Vice-Chancellor* for a variation in the form of his order. A petition was accordingly presented to the *Vice-Chancellor* by the Plaintiff, praying a variation in that part of the order which stated the consent of the parties that the cause should be decided

The Judge in the Court below, having, at the request and with the consent of both the Plaintiff and Defendant, undertaken to decide a cause, although he considered the question raised proper for an issue:—*Held*, that although the parties, by their recorded consent in the decree appealed from, had precluded themselves from asking for an investigation of the claim, the subject-matter of the suit, before a jury, the Court would permit the Appellant to shew, if he could, that what he claimed was so far free from doubt as to entitle him to the decree sought by his bill, with-

out the intervention of a jury; but if he fails in doing so, the appeal will be dismissed.

Semble, parties to a suit cannot, by their consent or other acts, on a rehearing or appeal, call on the Court to decide on a matter which, in the usual course, ought to be sent to and determined by another tribunal.

In the absence of any contract between partners, or any dealing from which a contract may be inferred, it will be assumed that the partners have carried on business on terms of an equal partnership; which implies not only an equal partnership *de facto* in profit and loss, but a right in each partner to join and insist on such participation. Notwithstanding, however, partners have shared equally in profits and losses, the presumption of an equal partnership will be rebutted, if the entries in the books and accounts of the partnership, instead of absolute silence as to the shares of the partners, have described the shares in which the partners were entitled in the business, as materially differing in amount and value.

Entries in the books of a partnership are as conclusive of the rights of the partners, as if they had been found prescribed in a regular contract.

1849.
 STEWART
 v.
 FORBES.
 ———
Statement.

by the *Vice-Chancellor*, without directing an issue, and on the same coming on to be heard before his Honor, in the following month of December, it was dismissed, with costs; from that decision the Plaintiff also appealed.

Mr. *J. Parker*, Mr. *Rolt*, and Mr. *A. Smith*, contended, for the Appellant, that the case was simply one in which the Court below, at the instance of both parties to the suit, had exercised a sound discretion, and pronounced a decision on the merits of the case, instead of directing an issue to be tried between them, and that such a course could not be deemed such as to preclude the right of appeal; and further, that the form of proceeding adopted by the Plaintiff in the Court below, was the proper one to pursue, where the object was to set right the order made by that Court; and they cited the following authorities on those points, viz.: *Morris v. Davies* (a), *Buck v. Fawcett* (b), *Bowker v. Hunter* (c), *Sheehy v. Muskerry* (d), *Davenport v. Stafford* (e)

The LORD CHANCELLOR, after dismissing the last-mentioned petition, without requiring the Defendant's Counsel to address the Court, observed, that he had ascertained, in an interview that he had had with the *Vice-Chancellor of England*, that his Honor, on the hearing of the cause, had formed a decided opinion that an issue ought to be directed, and had only proceeded to decide the matters in question between the parties, after a deliberate consent on their part that he should do so. His Lordship then intimated to the Plaintiff's Counsel, that they were at liberty to argue that the case was a proper one for his Lordship's decision, and did not require the intervention of a jury, but subject to its being clearly understood, that if, in the course of the argument, the question raised should prove to be one for the consi-

(a) 5 C. & F. 163.

(b) 3 P. Wms. 242.

(c) 2 Dick. 611.

(d) 7 C. & F. 1.

(e) 8 Beav. 503.

deration of a jury, the appeal, without more, must be dismissed.

Under the understanding referred to by the *Lord Chancellor*, the appeal against the decree of the *Vice-Chancellor* came on to be heard.

1849.
 STEWART
 v.
 FORBES.
 Statement.

The Plaintiff by his bill prayed a declaration, that he and the Defendant, Sir *Charles Forbes*, were entitled in equal shares to certain sums standing in the books of the mercantile house of Messrs. *Forbes & Co.*, of *Bombay*, that is to say, the sum of 38,945 *Rs.* 5 *a.*, standing to the credit of the account intituled "Sir *Charles Forbes*, Bart., for self, *M. F.*, and *J. S.*;" the sum of 100 *Rs.*, standing to the credit of the account intituled "Suspense Profit and Loss Account in Company, of 1830-31 to 1834-35;" the sum of 92,755 *Rs.* 14 *a.* 10 *p.*, standing to the credit of the account intituled "Profit and Loss Account of 1838-39;" and the sum of 17,318 *Rs.* 4 *a.* 2 *p.*, standing to the credit of the account intituled "Profit and Loss Account of 1839-40," and the interest accrued and to accrue thereon; and that payment might be directed accordingly, after deducting therefrom the sum of 6010 *Rs.*, standing to the debit of the account intituled "Suspense Profit and Loss Account of 1837-38 to 1839-40," and interest thereon; and, so far as might be necessary for the purposes therein mentioned, that accounts might be taken of the partnership transactions between the Plaintiff and the Defendant Sir *Charles Forbes*.

It appeared, that between the 1st August 1830 and 31st July 1840, the Plaintiff and Sir *Charles Forbes* were the sole partners in the house of *Forbes & Co.*, at *Bombay*, each having four-sixteenth annas or shares, the other eight-sixteenth shares being carried to an account intituled "Suspense Account in Company;" that the Plaintiff was first ad-

1849.

STEWART

v.

FORBES.

Statement.

mitted as a partner in the house, in the year 1810, but ceased to be such in the month of July, 1818; he again became a partner in the month of August, 1821, and finally ceased to be connected with the house in the year 1842. No articles of partnership ever existed between the parties, but the Defendant, Sir *Charles Forbes*, in and previously to the year 1810, was, and had ever since that year continued to be, the head or principal partner in the house, and had always reserved to himself the superintendence of the affairs of the house, and exercised the absolute right from time to time of admitting into the house as partners, such persons, and upon such terms, as he thought proper, and also of removing such persons from the house after their admission as partners. The capital of the house was 400,000 rupees, divided into sixteen annas or shares, up to the 31st of July, 1840, when it was divided, or considered as divided, into twenty annas or shares. The principal question was, whether the Plaintiff was entitled to one-half, or only to one-fourth of the balances of the several profit and loss accounts; and the difficulty in the case arose from certain of the shares of the partnership existing between the year 1830 and 1840, and of several preceding partnerships of the house of *Forbes & Co.*, not having been appropriated in the books of the house to any of the partners, but considered as suspense shares, and carried to accounts intitled "Suspense Accounts in Company," the suspense shares of the house, between the years 1818 and 1824, being originally carried to the account of "Sir *Charles Forbes*, his Suspense Account in Company," and afterwards altered in pursuance of directions contained in a letter of 8th September, 1824, sent by Sir *Charles Forbes* to the house in *Bombay*, to "Suspense Account in Company," and the suspense shares of subsequent partnerships which existed, including that from the year 1830 to 1840, being carried to the head of "Suspense Account in Company." Sir *Charles Forbes* claimed to be solely entitled to the undivided gains

and profits on those shares. There being no articles to denote the rights of the partners in the concern, and the Plaintiff and Sir *Charles Forbes* holding each the same number of shares, the Plaintiff insisted that either all the suspense shares, or at all events those which never stood in Sir *Charles Forbes*' name, belonged to the partnership generally, and that the practice of the house in all the divisions, as well of profits as of losses, which had been made, not only during the partnership existing between the years 1830 and 1840, but in former partnerships of the house, in which suspense shares existed, had been uniformly in favour of the Plaintiff's claim, and that such practice arose under the joint authority of the Plaintiff and Sir *Charles Forbes*. Sir *Charles Forbes*, on the contrary, insisted, that by virtue of his supplying the capital of the house, and of his being the senior and head partner therein, he had a paramount right of control over the whole of the affairs, and had exercised such right, as appeared by various letters written by him, and in evidence in the cause; and that he could and did admit or turn out any of its members at his own will and pleasure; and that, with the exception of one-fourth of the profits, which belonged to the Plaintiff, he could appropriate and distribute the same as he chose. Evidence at great length was adduced by the parties, consisting of the partnership accounts, and of various letters and other documents relating thereto. A witness, concerned during a long period with the *Bombay* house, gave testimony in favour of Sir *Charles Forbes*' continuous and absolute power and control over the partnership affairs, from an early period of the partnership, and of his right to the suspense shares.

In a letter dated in September, 1824, written by the Plaintiff to the house in *Bombay*, was the following passage: "The present object contemplated by Sir *Charles Forbes*, is to keep the suspense head open, until it squares

1849.

STEWART

v.

FORBES.

Statement.

1849.
 STEWART
 v.
 FORBES.
 —
 Statement.

itself, altering it, however, on opening of the books of 1824-25, from the present head of ‘*Sir Charles Forbes*, his Suspense Account in Company,’ to that of ‘Suspense Account in Company.’ In the event, however, of it being found necessary to appropriate the suspense shares otherwise, under *Sir Charles Forbes*’ direction, the arrangement above contemplated will of course give way, and the head be cleared, as pointed out by a debit or credit, to the profit and loss accounts of the respective partnerships;” and opposite to that passage, in the margin of the letter was the following words, in the handwriting of the Defendant, *Sir Charles Forbes*: “without which no arrangement respecting shares is at any time to be made, not even subject to my approval, but reference to be made to me in the first instance.”

In another letter, dated 11th June, 1832, addressed and sent to the *Bombay* house, and signed by the Plaintiff and Defendant *Sir Charles Forbes*, were the following passages, viz.:

“5. Not having been able to lay our hands on the ‘Suspense Profit and Loss Account’ of the year or years antecedent to 1827-28, we will thank you to send us a statement of it from its commencement, with particulars of the large balance above mentioned, of which it is composed.

“6. In the meantime, we again beg to draw your attention to the principle by which you are to regulate the adjustment of this, and all subsequent suspense accounts, in the absence of specific orders from us of a different nature.”

In two letters of the 14th of May, 1836, and 26th of October, 1836, sent to the *Bombay* house, and signed by the same parties, were the following passages, viz.:

“The suspense profit and loss balances are not to be appropriated till our further instructions.”

“The dividends coming to the credit of suspense profit and loss account in Company, of 1830-31, and 1835-36, and of the following years, in like manner will be held subject to the control of Sir *Charles Forbes*.”

1849.
STEWART
v.
FORBES.
—
Statement.

On the 13th of December, 1837, the Defendant Sir *Charles Forbes* sent to the *Bombay* house a letter as follows, viz.:

“With reference to the 8th paragraph of the joint letter to you from myself and Mr. *Stewart*, under date 26th of October, 1836, the several dividends to be credited to ‘Suspense Profit and Loss Account in Company, of 1830-31, to 1835-36,’ are therein directed to be held subject to my control, as well as those of the following years.

“In conformity with that power, especially reserved to me, I authorise you to transfer from the ‘Suspense Profit and Loss Account in Company, of 1830-31 to 1835-36,’ to the credit of Mr. *Stewart’s* personal account, the sum of one lac of rupees (100,000 rupees), under date the 31st of July, 1837.

“I direct this transfer now, with the view of placing, as early as practicable, Mr. *Stewart’s* account with the house upon a more desirable footing than it has been for some time past; and I shall hereafter direct the appropriation of the remaining funds at the credit of that head, when the outstanding contingencies, if any, under our joint responsibility, have been finally adjusted.”

The following passage was contained in a letter dated the 12th of June, 1838, from Sir *Charles Forbes* and the Plaintiff to the *Bombay* house:—

“We therefore cancel our letter of instructions under date 26th of October, 1836, so far as regards the arrangements for the firm of 1836-37, and the dividends from the

1849.
 STEWART
 v.
 FORBES.
 ———
Statement.

profit and loss accounts; but in all other respects it is confirmed, and you will act upon it accordingly.”

In a letter dated the 3rd of September, 1842, from the Plaintiff to Sir *Charles Forbes*, were the following passages, viz.:

“The balance at credit of the head of ‘*Sir Charles Forbes*, for self, *M. F.*, and *J. S.*,’ will be about 37,000 rupees on 31st July, 1842. This account was opened and carried on by transfer, annually, to its credit, of the $2\frac{1}{8}$ of the $9\frac{1}{8}$ per cent. interest charged on the joint account of the proprietors of the *Java* estates, from the 1st August, 1836, until the said joint account was finally closed on the 31st July, 1841. This reserve was to indemnify the surviving proprietors of the *Java* estates for any loss which the house at *Bombay* might sustain by its advances to the proprietors generally, and which, if it had occurred, would have fallen on you, your brother, and myself. The house at *Bombay*, however, sustained no loss by the proprietors of those estates, and the sum remaining unappropriated of this reserve appertains to those interested in the profit and loss accounts of 1836-7 to 1840-41, from which it was taken. In contributing to these allowances, I did so in the belief that a similar benefit would be extended to myself for the last thirty months of my residence in *Bombay*, which would bring a sum of about 19,500 rupees to my credit, with interest from 1822-23, and thus place me on a footing with the late Mr. *James Forbes* in that respect.

“I am not enabled to estimate what would be forthcoming to my credit from the sources to which I have alluded, but I seek to be relieved from participating in a loss appertaining to a partnership in which I had no interest, and that the same rate of interest should be allowed on the profit and loss accounts, and other outstandings in

which I am concerned, as has been charged on my personal account."

1849.
STEWART
v.
FORBES.
—
Statement.

On the 7th of the same month of September Sir *Charles Forbes* sent an answer to the last letter, repudiating the claims therein made; and on the 8th of February, 1844, the Plaintiff again wrote to Sir *Charles Forbes* a letter, part whereof was as follows:—

"I have always considered my right to participate equally with yourself in the balances at credit of the profit and loss accounts from 1830-31 to 1839-40 so entirely a matter of course, that I did not advert to the subject in my letter to you of the 3rd September, 1842, except as regarded the rate of interest at which those accounts had been made up; but as I have shared in an equal degree with yourself in all the heavy losses that have occurred since I rejoined the house on the 1st August, 1821, I am surely entitled, on the same principle, to share equally with you also in the profits that have accrued to the firm during the same period, and of which the sums at credit of the profit and loss accounts mentioned form part."

Mr. *James Parker*, Mr. *Rolt*, and Mr. *Archibald Smith*, relied on *Peacock v. Peacock*(a), as an authority in the Plaintiff's favour, that the Plaintiff and Defendant were entitled to share the profits of the house equally, no partnership articles existing in the present case, settling the proportions of profit to be enjoyed by the partners, and contended that the fact of the Plaintiff and Defendant, on the divisions of the profits of the house sharing the same equally, was a strong circumstance in favour of the Plain-

Argument.

(a) 2 Camp. 45; S. C., 16 Ves. 49.

1849.
—
STEWART
v.
FORBES.
—
Argument.

tiff's claim; that the control over the suspense shares, insisted on by the Defendant in some of the letters in evidence, was not by way of ownership, but only reserved to the Defendant a right to determine to what part of the partnership property they should ultimately be applied; and such suspense shares were, in reality, identified with the general interest of the house; and that no instructions were produced on the part of the Defendant to vary the established usage of the house in respect to the profits; and the division of profits, down to the year 1836-37, was an equal one; and in that year it was in evidence there was a fearful loss to the house.

[The LORD CHANCELLOR, during the arguments of the Plaintiff's counsel, adverted to the language used by the Plaintiff in his letters to Sir *Charles Forbes*, as that of a party not claiming a right, but asserting a grievance only, and speaking of the hardship of his being subject to share in the losses unless he was allowed to join in the receipt of the profits.]

Mr. *Bethell*, Mr. *A. J. Lewis*, and Mr. *Schomberg*, for the Defendant Sir *Charles Forbes*, contended that the entries in the partnership books, and the correspondence, shewed clearly that no appropriation had ever been made with respect to these suspense shares, except by the direction of Sir *Charles Forbes*; that they were evidently under his exclusive control; that, if the share which the Plaintiff had received had belonged to him as a matter of right, no directions from Sir *Charles Forbes* would have been necessary upon that point; that the whole course of the proceedings shewed that the ownership of Sir *Charles Forbes* over the suspense shares was never questioned; and he had alone contributed all the capital in respect of them.

The LORD CHANCELLOR:—

The question in this cause being, in what shares the Plaintiff and Defendant were interested, in the partnership carried on by them from the year 1830 to 1840, it is obvious, that when the cause was originally heard before the *Vice-Chancellor*, the case might have appeared so clear, either for or against the Plaintiff's proposition, as to enable the Court to dismiss the bill, or to decree for the Plaintiff on the evidence produced; or it might have appeared so far doubtful, as to have made it the duty of the Court, in the exercise of its usual practice, to direct an issue; both parties deprecating the latter course, and the *Vice-Chancellor*, kindly wishing to comply with the request of both parties, took on himself the duty, which was not part of his functions as a Judge in equity, of deciding on a matter of fact, which he must have been of opinion was proper for the decision of a jury.

1849.
 STEWART
 v.
 FORBES.
 Judgment.

In *Morris v. Davies*, a celebrated case of legitimacy, Lord *Lyndhurst* adopted a similar course; and on appeal to the House of Lords(a) from his decision, the House thought itself bound to consider and decide upon the case so entertained by the Court of Chancery, though not according to the usual course of its jurisdiction. I did not, therefore, feel myself at liberty to decline hearing the cause, although the parties had by their consent, recorded in the decree appealed from, precluded themselves from asking for, or me from directing, an investigation of this claim before a jury, the only proper tribunal for the purpose, if the matter were really one of doubt; besides which, I thought that the Plaintiff ought to be permitted to shew, if he could, that what he claimed was so far free of doubt, as to entitle him to the decree which he now asks, without the intervention of a jury; in which case, the consent, if applicable, would not

(a) 5 C. & F. 163.

1849.
 STEWART
 v.
 FORBES.
 ———
Judgment.

prejudice his claim. If it were necessary in this case to consider whether parties by their consent, or other acts, could on a rehearing, or on appeal, call on the Court to decide on a matter which, in the usual course, would be referred to another tribunal, I should probably not be disposed to have assumed that duty, except so far as the House of Lords informed me that I ought to do so. That question can only arise on matters in which the case appears to be so doubtful, that the Judge of the Court of equity finds that he cannot, on the materials before him, come to a satisfactory conclusion. It does not arise in the present case, because I am of opinion that the Plaintiff has failed in making out his case; and even if there had been no such consent as stands recorded, I should not have felt any difficulty in coming to a satisfactory conclusion without the assistance of a jury.

The Plaintiff puts this case in his bill, and his argument rests upon the supposition, that, from the year 1830 to 1840, Sir *Charles Forbes* and the Plaintiff were equal partners; and *Peacock v. Peacock* (a) was relied on as a foundation for that assumption. In that case it was properly held, that, in the absence of any contract between the parties, or any dealing from which a contract might be inferred, it would be assumed that the parties had carried on business on terms of an equal partnership. That case has no application to the present, because there is in this case conclusive evidence, not from any form of contract, but from the books of the business and the dealings between the parties, that such were not the terms on which the partners carried on their business. An equal partnership implies not only an equal participation *de facto* in profits and loss, but a right in each partner to claim and insist on such participation. That is what the law has implied,

(a) 2 Camp. 45; S. C., 16 Ves. 49.

in the absence of all evidence of a contrary intention of the parties. But what would have been the decision in *Peacock v. Peacock*, if the books and accounts, instead of absolute silence as to the shares of the partners in each year, had described the shares in which the partners were interested in the business, and had attributed to the Plaintiff four-sixteenths only of the shares of the business? These entries are as conclusive of the rights of the parties as if they had been found prescribed in a regular contract. In fact, the Plaintiff's case is not what the bill alleges, but it consists of this—not a contract of equality (for that is negatived by the entries in the books and by all the dealings between the parties), but on a supposed special contract, that upon any share becoming unappropriated by the death or retirement of a former holder of it, such share should be appropriated between the continuing partners, according to their original interest; but this the books negative; and if that had been the intention of the parties, there could not have been any reason for keeping the vacant shares on the books, but they would have become absorbed in the shares of the continuing partners, and this would have been a matter of right in each partner; and Sir *Charles Forbes*, although he might have dissolved the partnership, would have no more right to deprive any partner, whilst he continued in the partnership, of the proportion of such vacant shares, than of their own. It appears, however, from the commencement to the end, that Sir *Charles Forbes* claimed and exercised such a right, and that neither the Plaintiff nor any of the partners set up any title adverse to it. The fact appears to be, that Sir *Charles Forbes*, having succeeded to this establishment of his uncle, who founded it, considered himself, and was considered by all the persons whom he from time to time admitted into the partnership with him in that business, as the master and owner of that concern; he alone supplied the capital and divided the business into sixteenth shares,

1849.
 STEWART
 v.
 FORBES.
 Judgment.

1849.
STEWART
v.
FORBES.
—
Judgment.

which, at his own will and pleasure, he from time to time disposed of in various proportions between the different partners, but which he resumed at pleasure, and either bestowed those shares on others, or kept them unappropriated, describing them in the books as "*Suspense Shares*." At the first they were styled "*Sir Charles Forbes, his Suspense Shares in Company*," afterwards they were called "*Suspense Shares in Company*," and which shares, though kept alive in the books, were treated, for the purpose of profit and loss, as actual shares. It was attempted, on the behalf of the Plaintiff, to shew that this was done for the purpose of obtaining an accumulated means to meet the chances of future losses; but this attempt wholly failed, the general profit and loss account being dealt with in another form for this purpose.

The only fact established by the Plaintiff, on which he could rest his claim was, that in many instances (and if in all it would make no difference), the profits attributed to those suspense shares were divided between the existing partners according to their own shares. If this had been done as a matter of course on every division of profit, some evidence would have been afforded of some contract for that purpose, though that is not the case made by the bill; but it appears, that in every case of a division of profits of the suspense shares, a special direction was given for that purpose by *Sir Charles Forbes*, by which the existence of any contract for the purpose is disproved. It was, indeed, said in most, if not in all those directions, *Mr. Stewart* was a party, which adds to the weight of the evidence against him; for that circumstance shews that he made no claim of right, which, if it had existed, would have made such special directions unnecessary, and would have been placing himself in the position of receiving a bounty from another which, by right, was his own. The letter of September, 1824, which was relied on by the Plaintiff, as

1849.
 STEWART
 v.
 FORBES.
 —
Judgment.

shewing the appropriation of the suspense shares, does not shew such appropriation, except under the express directions of Sir *Charles Forbes*, with the knowledge of the Plaintiff, who wrote the letter, and under an express reservation that the future appropriations of the suspense shares were to be under Sir *Charles Forbes*' direction; and to that letter Sir *Charles Forbes* adds:—[His Lordship read the passage already set forth.] It was contended for the Plaintiff, that the profits now claimed for him arose during the period in which joint instructions were given as to dealing with the profits of the suspense accounts, and the letter of the 11th of June, 1832, was relied on for that purpose. Had that been so, it would not be applicable to the case made by the Plaintiff, who claims not under a special gift, but under a general right as an equal partner. The fact, however, does not exist; for a subsequent letter of the 14th of May, 1836, directs, that the "suspense profit and loss balances are not to be appropriated till our further instructions;" and, by the letter of the 26th of October, 1836, signed by Sir *Charles Forbes* and the Plaintiff, it is directed,—[His Lordship read the passage from the letter of the 26th of October, 1836.] There are many other passages of the letters and the entries in the books which are conclusive against the Plaintiff's claim; and, notwithstanding some circumstances, and some loose expressions that were relied on for the Plaintiff, no doubt appears to me to remain, on the written evidence alone, of the entire failure of the Plaintiff's title, in addition to which there is the important evidence of Mr. *Bowman*.

The result is, that, in my opinion, it is clearly proved the Plaintiff never had any right as a partner to more than one-fourth of the profits of the business; the suspense shares were, and were known and acknowledged by all parties concerned, to be the exclusive property of Sir *Charles Forbes*, and the Plaintiff frequently derived a portion of

1849.
 STEWART
 v.
 FORBES.
 ———
Judgment.

the profits of such shares as a bounty. But Sir *Charles Forbes* never sanctioned the Plaintiff's claim to that portion of the profits claimed by him by his bill; and the Plaintiff has no title whatever to what he claims. The present appears to me to be an attempt on the part of the Plaintiff to use his friend's bounty as evidence of a right, which his own conduct throughout his connexion with Sir *Charles Forbes* disproves.

I have, therefore, no hesitation in affirming the decree of the *Vice-Chancellor*; and I have only to express my regret that so clear a case has occupied so much of the time of the Court. The appeal must be dismissed, and dismissed with costs.

Feb. 16th.

In re POULTON, a Lunatic.

An *ad interim* committee will not be ordered to execute a reconveyance of an estate vested in the lunatic as mortgagee.

SOME estates were vested in the lunatic as a mortgagee, and a petition was presented by the *ad interim* committee, praying for leave to execute a reconveyance.

Mr. *Wood* appeared in support of the petition, and referred to the 3rd and 5th sects. of the 1 Will. IV, c. 60.

The LORD CHANCELLOR refused to make the order asked for, and directed the petition to stand over until a committee of the estate had been appointed, with liberty to amend.

1849.

COLE v. SCOTT.

Nov. 29th.

THIS was an appeal from the decision of the *Vice-Chancellor of England*, who overruled a general demurrer which had been put in to the bill.

From the statements in the bill it appeared that *John Cole*, deceased, made his will, dated the 29th of April, 1843, and thereby devised as follows:—"I give, devise, and bequeath unto my dear wife, *Anne Cole*, all and singular the messuage, &c., wherein I *now* reside." And he disposed of his residuary estate in the following terms:—"And as to all and singular the residue and remainder of my messuages, farms, lands, hereditaments, and premises, whatsoever and wheresoever, and of what tenure or nature soever, and generally all the freehold, copyhold, and leasehold estates, whereof I am *now* seised or possessed, in any manner howsoever, all which are hereinafter designated and intended to be described as my said residuary real estate, and which are not hereinbefore by me specifically devised and bequeathed; and as to all the residue and remainder of my personal estate and effects, whatsoever and wheresoever, and every part thereof, I give, devise, and bequeath the same residuary real, and personal estate, and every part thereof, unto and to the use of my nephew, *Francis Caleb Scott*, and my nephew, *Henry Scott*, their heirs, executors, administrators, and assigns respectively; nevertheless, upon the trusts, intents, and purposes hereinafter declared of and concerning the same." The testator then directed his trustees to sell the estates, and to apply the proceeds as therein mentioned,

Under the provision in the Wills Act, 1 Vict. c. 26, that every will shall be construed as if it had been executed immediately before the death of the testator, unless a contrary intention should appear by the will, it is not necessary that the intention should be expressed in terms, but it may be inferred by the Court, upon a fair and usual construction of the language of the will.

Where a testator devised the house "wherein I now reside," and "all the remainder of my real estates whereof I am now seised," and afterwards devised "all such trust estates as are now vested in me, or, as to the leasehold premises, as shall be vested in me at the time of my death," freehold

estates purchased by him between the date of his will and his death did not pass under the devise.

Effect upon proceedings on appeal, where the Court below offered to send a case for the opinion of a Court of law, but the parties concurred in asking for the decision of the Court without a case. The fact of such a proceeding ought to be stated in the decree.

1849.

COLE

v.

SCOTT.

Statement.

and then proceeded in these words:—" And, subject to the several legacies and bequests aforesaid, I give and bequeath the whole of the residue of the proceeds of my said residuary real, and personal estate, unto and equally between my seven nephews and nieces (naming them), for their own absolute use and benefit." And in a further part of his will, he devised as follows:—" And I give, devise, and bequeath unto my said nephew, *Henry Scott*, all such manors, messuages, farms, lands, tenements, and hereditaments whatsoever, as well freehold as copyhold and leasehold, as are *now* vested in me, or as to the said leasehold premises as shall be vested in me *at the time of my death*, as a trustee or mortgagee in any way howsoever: to hold unto and to the use of the said *Henry Scott*, his heirs, executors, administrators, and assigns, upon and subject to the like trusts as the same are now or shall be vested in me, and with the same powers and authorities, as far as I can devise and bequeath the same, as I have over the same respectively." And the testator nominated and appointed the said *F. C. Scott*, *H. Scott*, and *James Brooks*, executors of his will.

The testator died in September, 1846, without having revoked or altered his will, and leaving the Plaintiff, who was his nephew, his heir-at law. Subsequently to the date and execution of the will, the testator contracted to purchase some freehold hereditaments for 830*l.*, and accepted the title; but before the contract was completed, or the purchase-money paid, he died. The bill prayed a declaration that the testator died intestate as to the freehold hereditaments and premises so contracted to be purchased by him as aforesaid, and that the Plaintiff was entitled to have the contract completed for his benefit, and the purchase-money for the hereditaments and premises paid by the executors out of the residuary personal estate of the testator.

It was stated, although not altogether acquiesced in, that when the case was before the *Vice-Chancellor*, his Honor suggested it was a proper case for the opinion of a Court of law; but, upon all the parties requesting him to decide it without sending it to law, he consented to do so.

1849.
 }
 COLE
 v.
 SCOTT.
 —
Statement.

THE LORD CHANCELLOR.—If you can shew me that the *Vice-Chancellor* was wrong, the appeal is open; but if the mode of hearing was regulated by agreement, I should not let the parties depart from it. I have had this point before me on former occasions, and I have said, that if the parties choose their own mode of hearing a cause, they cannot come here and complain of that.

It is much better, when any arrangement of that kind is made, that it should be recorded in the decree. The Court very often says, “I am of opinion that this is a matter which, if there is any doubt about it, ought to have gone to law;” but the parties wish the Court to give an opinion after the Court has intimated the course which it thinks ought to be adopted. Then the decree should recite that, otherwise it does not appear why the Court departed from the usual course of practice.

Mr. Bacon, Mr. Malins, and Mr. J. T. Humphry, in support of the appeal.

Argument.

Under the 24th sect. of the Act 1 Vict. c. 26, the Court will only look to the time of the death of the testator, to determine what estates would pass by the will.

[THE LORD CHANCELLOR.—Unless the testator has himself fixed some other date. The argument seems to assume that the testator meant to die on the day on which the will was made. When a document contains a date, and

1849.

COLE

v.

SCOTT.

Argument.

the word "now" is used, can you construe the word "now" as meaning, not the date appearing on the document, but some other time? The testator has also, in another part of his will, used the word "now," as clearly meaning the day of the execution of the will. Should not that have the same effect as if he had said, "now, this 29th day of April?"

Before the Wills Act, no one could pass any freehold estate which he acquired after the date of his will. The will is now to be construed as speaking at the death of the testator. When, therefore, a testator mentions "the estates of which I am seised," the expression must be referred to the time of his death; and, if he adds the word "now," it is immaterial. The will still speaks at the time of the death; and the word "now" must be referred to the same moment. In *Doe d. York v. Walker* (a), the testator used the expression, "of which I am seised;" and the Court held, that estates of which he was not seised at the time of his will, passed by the devise. At all events, the intention of the testator, that his will should *not* be construed as speaking at the time of his death, ought now to be expressed with as much clearness as the Court formerly required, before it would put the heir-at-law to his election, whether he would give effect to the intention of a testator who wished to pass estates which were acquired after the date of his will: *Thellusson v. Woodford* (b), *Back v. Kett* (c).

[The LORD CHANCELLOR.—That is the rule of equity in cases of election. The other is a case of construction. The Court will not put a party to his election, unless the intention is clear. But it is not necessary, in the other case, to be free from doubt; the Court will put a construction upon words, if it can see sufficient ground for do-

(a) 12 M. & W. 591.

(b) 13 Ves. 209.

(c) Jac. 534.

ing so, although they are not free from doubt. The words of the Act are “unless a contrary intention *appear*,” that is to say, if, from the true construction of the will, construed as wills ordinarily are, the intention appears the other way, then the rule is not to apply. There is no such clearness necessary as is required in cases of election.]

1849.
 ———
 COLE
 v.
 SCOTT.
 ———
Argument.

Mr. Rolt, Mr. Campbell, and Mr. R. W. Moore for the Plaintiff, in support of the decree.

The Wills Act directs that every will shall speak from a given time. Can this will speak from the date of it as to estates vested in the testator as a trustee or mortgagee, and from another time as to other portions of his property? The first devise relates to the house in which “I *now* reside.” Can that devise be held to relate to any house except that in which the testator resided at the date of his will?

The Wills Act placed real and personal estate upon the same footing in this respect. Before that Act, a bequest of “all the personal estate of which I am possessed” would pass all which the testator had at the time of his death. But if he had said “all of which I am *now* possessed,” the result would be different. In the *Attorney-General v. Bury* (a), a bequest of “arrears *now* due,” was held not to carry arrears which became due between the date of the will and the testator’s death.

The same principle is acted upon in cases of gifts to a class of children, where children living at the death of the testator would be entitled; but if he used the expression, “children *now* living,” those children only who were living at the date of the will would take under such a bequest. The word “now” is used three times in the course

(a) 1 Eq. Ca. Abr. 201.

1849.

COLE

v.

SCOTT.

Argument.

of this will, and according to the ordinary rules of construction, it ought to receive the same interpretation in each part of the will; and, with reference to the house and the leaseholds, it cannot refer to any time except the date of the will.

The introduction of the word “now,” distinguishes this case essentially from *Doe d. York v. Walker* (a).

[The LORD CHANCELLOR.—What the Appellants have to do is to shew that there is sufficient doubt to make it expedient for me to send it to law. After the way in which the case proceeded in the *Vice-Chancellor's* Court, I shall certainly not reverse the decision.]

Mr. *Bacon*, in reply, contended that none of the expressions in the will were sufficient to take the case out of the general rule, that a will must be construed as speaking at the time of the testator's death.

The LORD CHANCELLOR:—

Judgment.

In questions of this sort, which are very likely to occur, and to be matter of discussion in all the different courts, it is certainly very important, if there is a really debateable case to be considered, to adopt a course that should create a uniformity of decision upon them; but then, I think it must be a debateable matter. I cannot send to a court of law a question, on which I conceive there is no doubt; and although I should be unwilling to act on the impression of there being no doubt on a purely legal question, if nothing else had taken place, yet where the parties have had the good sense, I think, to depart from the ordinary course of proceedings in a Court of equity, which

(a) 12 M. & W. 591.

is to send a merely legal question to a Court of law, and have asked to take the opinion of a Court of equity in the first instance, I cannot permit them to depart from that arrangement. Before the case was decided, they were very willing to take the decision of the Court; but when the opinion of that Court which they have selected is against them, they adopt a very different view, and wish to take their chance of another discussion. That is not what I call a subject-matter of appeal, because the Court below has never exercised any discretion upon that. If the *Vice-Chancellor* had said "No, I will decide the case on my own authority, and will not send it to law," there might have been a ground of complaint; but that was not done. The *Vice-Chancellor* was aware of the usual course, as to the expediency of applying to a Court of law, not on account of any doubt or difficulty which he felt, but because it was a purely legal question. The parties agreed that they were desirous of having his opinion on the case as it stands, and he very properly indulged them, and gave them his opinion. Then it comes before me, the Appellants disputing the decision of the *Vice-Chancellor*, and asking for a contrary decision on the construction of the will. It is quite competent for them to do that; but when I express my opinion, that, according to the view I take of it, the *Vice-Chancellor* is right, I do not think it is competent to them to say, "Now adopt that course which we repudiated below, and give us a third chance before another Court." I think there is no doubt that the course taken below was judicious and proper; and the question is, what effect that ought to have on the case now before me.

1849.
 —————
 COLE
 v.
 SCOTT.
 —————
Judgment.

But since this has been more fully investigated, it appears to me so free from doubt, that, under any circumstances, I should be very reluctant to expose the parties to further litigation upon it. The Statute being, that the rule shall prevail, "unless a contrary intention shall appear by

1849.

COLE

v.

SCOTT.

Judgment.

the will," it is not necessary at all to find a contrary intention expressed in so many words, or in something free from doubt. I find, on the fair construction of the will, adhering to those rules in that construction which are usually adopted in construing wills, that the contrary intention does appear. The result, therefore, of such an opinion on such a construction of the will, will inevitably lead to taking the case out of that sect. of the Act.

I have not any doubt whatever on this will what was the testator's intention. Whether it arose from not having present to his mind, when he made the will, the provisions of the Statute, or for what other reason, it is quite immaterial to consider. The question is, whether, in the terms he has used, he has not used the word "now," with reference to the time he was making his will. I think it quite clear he has. I find a will with a date to it, shewing the period when it was executed; and I find that he gives "all the estates of which I am *now* seised or possessed." "Now" has no meaning in itself; and if there is no date to construe it, you must ascertain something to which it can refer, where the date of the execution does not appear. But here the date does appear, and the word "now" can only have reference to the time specified in the will. The time specified in the will is the date of it, namely, the 29th of April, 1843; and it appears to me to be just the same as if he had said, "all the freehold and leasehold estates of which I am, on this 29th of April, 1843, seised and entitled." If those had been the words, of course there could not have been a doubt. Are they not, in effect, the same words? What is the difference whether he repeats the date, or whether the word "now" shews he refers to the date?

That is one view of it, in which I merely refer to the very words to be found in this particular clause. But the

testator does not stop there; for he uses the word "now" in two other parts of the will, in each of which he evidently and clearly alludes, not to the time at which it may come into operation by his death, but to the particular time at which he is making his will. Am I, then, in taking a fair view of the expressions used, in order to see what he intended, and in trying to put a fair construction on the word "now," which you find in the particular clause, to disregard the same word used with reference to other gifts in other parts of the will? It would be departing from the ordinary rule of construction to do so; and it appears to me beyond all doubt and question, that, in using the word "now," he meant the day on which he made his will, and no other time. Then it comes within the Act, which says, if the contrary intention appears, the provision is not to apply. I am of opinion, that, in this case, the contrary intention does appear.

1849.
 COLLEGE
 v.
 SCOTT.
 Judgment.

With reference to the question of personalty, to which *Mr. Rolt* has referred, it is as clear as can be. The Act, in effect, puts the case of real and personal property on the same footing; and though wills of mere personalty, as a general rule, speak from the day of the death, and not from the state of the property at the time of making the will, yet, if there are expressions in the will shewing it was intended to describe property with reference to the day of the date of the will, and not the day of the death, then that intention would prevail. It prevails, undoubtedly, in cases of personalty; and, by this Act, personalty and real estate are, in this respect, in the same position.

For these reasons, I am of opinion, upon the construction of the will, and also from what passed in the Court below, that there is no case here which would authorise me, or justify me, in sending a case for the opinion of a Court of law. I must, therefore, dismiss the petition of appeal, with costs.

1849.

Nov. 7th.

Ex parte SANDERSON, *In re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY.

The 33rd section of the Joint-stock Companies Winding-up Amendment Act, 1849, is retrospective; and where notice of a motion of rehearing of an order made before the passing of that Act, had not been served within the time limited by the 33rd section, the Court refused to hear the application.

THIS was a motion by way of appeal from an order of the Vice-Chancellor *Knight Bruce*; but notice of the motion had not been given until more than three weeks had expired from the date of the *Vice-Chancellor's* order.

Mr. *J. Russell*, and Mr. *Headlam*, raised a preliminary objection, referring to the 33rd section of the Joint-stock Companies Winding-up Amendment Act, 1849, which enacted, that no notice of motion for a re-hearing before the *Lord Chancellor*, of any order of the *Vice-Chancellor*, under the Winding-up Act or that Act, should be given after the expiration of three weeks after the order complained of should have been made.

Mr. *Bacon*, in support of the motion, contended that that section was not retrospective in its operation; that it spoke of orders to be made "under the former Act or that Act," and therefore clearly referred to future orders only; that the Act of 1849 only received the Royal assent on the 1st of August, and that the order appealed from was made on the 7th of July; and the parties were, in fact, deprived by the Act itself of every chance of appealing, if the construction which was contended for was supported.

The LORD CHANCELLOR was of opinion, that, however hard the case might be, the language of the Act was too clear for the Court to assume any authority in such a case as this. The section was, unquestionably, retrospective in its operation, and this appeal must be dismissed on the ground that notice of it was not given within the time limited by the Amendment Act.

PIMM v. INSALL.

THIS case came before the *Lord Chancellor*, on appeal from a decision of the Vice-Chancellor *Wigram* (a).

It was a creditors' suit for the administration of the estate of *Thomas Stanley Hill*, who died intestate as to real estate, having made a will which operated on personal estate only. His death occurred in March, 1837, and his personal estate was insufficient for the payment of all his debts. He left his only child, *Mary Ann Stanley Hill*, his heiress-at-law. In August, 1837, *M. A. S. Hill*, being then a minor, intermarried with *F. J. Insall*; and by articles made in contemplation of that marriage, it was agreed, that, if she should live to attain the age of twenty-one years, the real estates which had descended to her from her father should be conveyed to the use of herself and her husband successively for life, with remainder to the use of the children of the marriage, with the ultimate remainder to her in fee. And it was agreed that *Insall* and his wife, and the trustees named in the articles, or the major part of them, might, at any time within six months after *M. A. S. Insall* attained the age of twenty-one years, vary all or any of the limitations thereby agreed to be made, without prejudice to the provision for the wife; and also to insert a clause in the proposed settlement, giving to *M. A. S. Insall* a power of revocation of the trusts of the settlement, and of appointment to new uses.

M. A. S. Insall attained twenty-one in January, 1839, and indentures of settlement of the 1st and 2nd of May, 1840, were executed, by which *Insall* and his wife conveyed the real estates to the trustees, to the uses expressed

1848.
Nov. 17th
& 18th.
1849.
Nov. 20th.

Where the personal estate of a debtor was insufficient to discharge all his debts, the right of his simple contract creditors to have their debts satisfied out of his real estate, which had descended to his heiress-at-law, was held not to have been defeated by articles executed by her while still a minor, previously to and in contemplation of her marriage.

(a) See 7 Hare, 193.

1848.
 PIMM
 v.
 INSALL.
 ———
Statement.

in the articles. A power of revocation and new appointment was thereby reserved to *Insall* and his wife; and by another indenture, dated the 4th of May, 1840, purporting to be made in execution of that power, *Insall* and his wife revoked the uses declared by the settlement, and appointed the estates to other trustees, upon trust to sell and apply the proceeds in payment of the debts of *T. S. Hill*; and the trustees were to stand possessed of the surplus for such purposes as *Insall* and his wife should appoint, and in default of appointment, upon the trusts of the settlement.

M. A. S. Insall died in September, 1840, leaving two infant children; and in July, 1844, a suit was instituted on behalf of one of these children against the other child, and *Insall*, and the trustees both of the articles, and of the deed of the 4th of May, 1840. The cause was heard before the *Vice-Chancellor of England* in July, 1844, when his Honor set aside the settlement of the 1st and 2nd of May, 1840, and also the indenture of the 4th of May, except so far as it operated upon the legal estate; and he declared that the trustees named in it were trustees of the legal estate upon the trusts of the articles.

The present suit was instituted in November, 1838, against *Insall* and his wife and their children, and the trustees of the articles, and the executor of *T. S. Hill*. The bill alleged that *Insall* and his wife had no means of paying the debts of *T. S. Hill*, except by the proceeds of his real estate; and it prayed, that, if the personal estate of *T. S. Hill* should be insufficient for the payment of all his debts, the deficiency should be made good by the sale or mortgage of part of his real estate.

The Vice-Chancellor *Wigram* made a decree in accordance with the prayer of the bill; and the children of Mrs. *Insall* appealed from his Honor's judgment.

Mr. *Wood* and Mr. *Malins* appeared for the Appellants;
and

The *Solicitor-General* and Mr. *De Gex*, for the Plaintiff.

1848.
PIMM
v.
INSALL.
—
Argument.

The first point was, whether the real estate was still liable to the claims of the creditors, as the articles were executed while Miss *Insall* was a minor; or whether those articles, although voidable, were valid and effectual, unless she afterwards repudiated them.

On this point, in addition to the cases referred to in the *Lord Chancellor's* judgment, the following were also cited: *Hastings v. Orde*(a), *Godsal v. Webb*(b), *Flight v. Boland*(c), *Zouch d. Abbot v. Parsons*(d), *Durnford v. Lane*(e), *Doe d. Simpson v. Butcher*(f), *Machil v. Clark*(g).

The second point was, whether, under all the circumstances, creditors could substantiate their claims against the estates, or whether the estates were protected by the settlement or articles.

On this point, *Gooch's case*(h), *Apharry v. Bodingham*(i), *Spackman v. Timbrell*(k), *Mathews v. Jones*(l), *Countess of Coventry v. Earl of Coventry*(m), *Milner v. Lord Harewood*(n), were cited.

Mr. *Metcalf*, Mr. *Campbell*, and Mr. *Heathfield*, appeared for other parties.

(a) 11 Sim. 205.

(b) 2 Keen, 99.

(c) 4 Russ. 298.

(d) 3 Burr. 1794, 1808.

(e) 1 Bro. C. C. 106.

(f) 1 Doug. 50.

(g) 2 Salk. 619.

(h) 5 Rep. 60 a.

(i) Cro. Eliz. 350.

(k) 8 Sim. 253.

(l) 2 Anst. 506.

(m) 2 P. Wms. 222.

(n) 18 Ves. 275.

1849.
 PIMM
 v.
 INSALL.
 Nov. 20th.
 Judgment.

The LORD CHANCELLOR (after stating the facts of the case):—

The decree which was made by the *Vice-Chancellor of England*, in the infant's suit, ascertained and regulated the rights and interests of the infants, who are the present Appellants, and they cannot be heard to raise any objection in this suit to what was decided by the *Vice-Chancellor's* decree. But the object of this suit is to obtain payment, by the simple contract creditors of the late Mrs. *Insall's* father, out of the real estate which descended to her. The effect of the decree appears to me to reduce the case to the question, whether the articles of 1837 affected the claims of these creditors. Authorities were quoted for the purpose of shewing what would have been the effect of such articles if the heiress-at-law had been twenty-one at that time. It is quite unnecessary to consider that point, for the heir in this case being an infant, her contract could not affect the interests of others in the estate. And the decree of the *Vice-Chancellor* has decided that the subsequent transactions of 1840 were inoperative, except so far as they affected the legal estate, making the appointees trustees for the purpose of the articles.

If these articles, being merely a contract by an infant heir, did not affect the claims of the creditors,—and the decree has decided that the subsequent transactions had not that effect,—what objection could there be to the decree of Vice-Chancellor *Wigram*, which is the usual decree in a creditors' suit? The recent cases of *Spackman v. Timbrell* (a), and *Richardson v. Horton* (b), were referred to for the purpose of proving that an alienation, although it was not a sale, by a party who was the son of a debtor, whose debt exceeded the amount of his personalty, placed his land out of the reach of his creditors: and such alienation, it was

(a) 8 Sim. 253.

(b) 7 Beav. 112.

contended, had taken place in the present instance. It appears to me that the decree of 1844 excludes the latter proposition of fact, and therefore makes it unnecessary to consider the proposition of law. That decree, recognising the operation of the deed of 1840, so far as relates to the legal estate, declares that the appointees are trustees for the uses and trusts of the articles of 1837; declaring in terms that the appointment of the 4th of May, 1840, was invalid in equity, and that the power reserved in the deed of the 2nd of May, 1840, was contrary to the articles, and invalid in equity. It does not profess to correct the deed of the 2nd of May by striking out the power, which would have been contrary to the obvious intention of the parties, who, two days after the power was reserved, professed to execute it by the deed of the 4th of May,—the whole obviously being one and the same transaction in effect. The decree treated and declared the whole transaction of 1840 to be void in equity, and operative only as it affected the legal estate, referring all the beneficial interests of the parties to the articles of 1837. Upon these articles, therefore, the present rights of the parties must depend.

1849.
 PIMM
 v.
 INSALL.
 Judgment.

This case on the articles is simply that of an agreement by an infant heir on marriage, never carried into effect. It is too late to contend that such a contract is binding: *Clough v. Clough* (a), *Simson v. Jones* (b). How, then, can such an agreement defeat the claims of creditors which existed at the time it was entered into? There is neither sale nor alienation; and notwithstanding the well-founded observations as to the law treating the heir as liable to the ancestor's debts to the extent of assets descended, and not the land itself as liable, it is certain that this Court gives to the creditors the benefit of their rights by selling the land itself. If, therefore, before alienation, creditors file their bill

(a) 5 Ves. 710.

(b) 2 Russ. & M. 365.

1849.
 ———
 PIMM
 v.
 INSALL.
 ———
Judgment.

for that purpose, they obtain such a decree as that which is now appealed from: the decree of 1844 has declared that there was no alienation, and the land, under that decree, is still in the hands of the heir. There is nothing in this view of the case inconsistent with the decision of the *Master of the Rolls* in *Richardson v. Horton*; for his Lordship says, “by taking proper proceedings, the specialty creditors may obtain payment, out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated.” This last observation, which is a necessary consequence of the principal point decided, would deserve much consideration if the principle of that decision were now in question. An infant heiress in possession of real estate, subject, up to the moment of her marriage, to the debts of her ancestor, on that event settles the land, taking probably for herself and her husband a life interest. If by so doing she became personally liable to all such debts, and she parts with the property out of which they might be paid, a state of things might arise which none of the parties could intend, and which may make it more than ever necessary to look to the situation of the ancestor’s affairs. I do not by this observation intend to intimate any opinion as to the soundness of the principle on which that and the other cases are founded, but only to suggest a consideration of one of the consequences which may arise.

I proceed on the ground that the attempted alienation was decided, by the decree of 1844, to be of no effect in equity, and that the parties were remitted to their rights under the articles; and that those articles could not, in my opinion, affect the claims of the creditors. I therefore affirm the decree of Vice-Chancellor *Wigram*, with costs.

1849.

THE ATTORNEY-GENERAL v. JONES.

Dec. 12th,
13th, & 15th.

THE question in this case was, whether the stock in which part of the purchase-money paid for the lighthouse upon the island called *Skerries*, near *Holyhead*, had been invested, was liable, on the decease of its owner, to pay legacy duty or probate duty to the Crown.

The profits arising from the tolls received under a grant of a lighthouse, are in the nature of realty, and not liable to either probate or legacy duty.

On the 29th of June, 1713, *William Robinson* granted to *William Trench* the island called *Skerries* for ninety-nine years, from the 24th of that month, at the yearly rent of 10*l.*, until a lighthouse should be erected; and at the yearly rent of 20*l.* afterwards.

The King v. Coke, 5 B. & C. 797, explained.

By letters patent, granted by Queen Anne, dated the 13th July, 1714, liberty was given to *W. Trench*, his executors, administrators, and assigns, to build a lighthouse on the island, and to collect from every vessel passing the same a duty of 1*l.* per ton for sixty years, paying to her Majesty the annual rent of 5*l.*; and, by an Act of Parliament passed in the 3rd year of the reign of King George II, it was enacted, that the powers, liberties, and privileges granted by the letters patent, should have continuance from the end of the said term of sixty years for ever, and should be fully vested in *Sutton Morgan*, his heirs and assigns, who were thereby authorised to collect the tolls freed from the payment of the rent of 5*l.*

The letters patent and Act of Parliament, 3 Geo. II, are stated at greater length in the judgment, and are, therefore, only shortly adverted to here.

In the year 1810, a few years before the termination of the lease of the 29th June, 1713, the estate and interest of

The *Solicitor-General* and Mr. *Maule*, in support of the
 position.

1849.
 ———
 ATT.-GEN.
 v.
 JONES.
 ———
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(a) 1 Siderfin, 158.

1849.
 ———
 ATT.-GEN.
 v.
 JONES.
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1849.
ATT.-GEN.
v.
JONES.
—
Argument.

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1849.
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 ATT.-GEN.
 v.
 JONES.
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1849.
 ATT.-GEN.
 v.
 JONES.
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1849.
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1849.
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JONES.
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1849.
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1849.
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 JONES.
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(a) 1 Siderfin, 158.

1849.
 ATT.-GEN.
 v.
 JONES.
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his Court, though the rock be the freehold of another, and part of his inheritance." The only other authorities on the point are those that relate to the liability to be rated for the relief of the poor, and lighthouse dues are not so rateable, because they have not been considered to be of the nature of real estate; and the officer appointed to collect the same is the servant of the Crown, and he is compensated for the duties performed out of the fees paid by the parties benefited by the lighthouse, and not from the land. So, the salary in a salt-office is paid in respect of the services performed (a). *The King v. The Inhabitants of Tynemouth* (b) and *The King v. Coke* (c), and more particularly the observations, in the latter case, of Mr. Justice Bayley, are in favour of the Crown's claim to legacy duty; and the only authority to be found which is opposed to those cases is *Ex parte Ellison* (d), which was only a decision on the construction of the Act 6 & 7 Will. IV, c. 79, and in which it was not necessary to enter into the consideration of *The King v. Rebow* (e). The office in the present case is one of trust, and of great importance to the Crown; and it is most desirable that the duties of it should be well performed.

Secondly, as to probate duty. A grant of a chattel to a man and his heirs is an ordinary matter, as appears from 1st Inst. fol. 2, where the passage is: "so it is if an annuity be granted to a man and his heirs, it is a fee simple personal." In *The Earl of Stafford v. Buckley* (f), an annuity in fee, granted out of *Barbadoes* duties, was held not to be a rent or realty; the dues here would be *bona notabilia* which the Ordinary would take, and they would be assets

(a) Bott's Poor Laws, by Const, Vol. 1, Case 171, p. 138, 5th edit.

(b) 12 East, 46.

(c) 5 B. & C. 797.

(d) 2 Y. & C. 528.

(e) Cited in *The King v. The Inhabitants of Cardington*, Cowp. 513; Bott's Poor Laws, by Const, Vol. 1, Case 177, p. 142, 5th edit.

(f) 2 Ves. sen. 171.

for the payment of debts, and therefore liable to probate as well as legacy duty.

1849.
 ATT.-GEN.
 v.
 JONES.
 —
 Argument.

[The following cases, on which the question arose as to the Mortmain Acts, were also cited in support of the information: *Negus v. Coulter*(a), *Howse v. Chapman*(b), *Knapp v. Williams*(c), *Thompson v. Thompson*(d), *Sparling v. Parker*(e).]

Mr. Watson, Mr. W. P. Wood, and Mr. Pitman, for the Defendants.

The tolls in this case are paid in respect of an incorporeal hereditament, and cannot be separated from the franchise itself. The case of *The King v. Coke*, is a clear authority for the Defendants; and Mr. Justice *Holroyd* there put the matter in its true and proper light. The privilege here granted is not the office, but a franchise, without reference to the question whether the land be in the grantee or not, and it is entailable because it savours of realty (f), and is descendible from ancestor to heir. In 2 Bl. Com. c. 3, various instances are set forth of incorporeal hereditaments, and, amongst others, franchises savouring of realty. In *Buckeridge v. Ingram*(g), navigation shares in the river *Avon* were held to be realty; and if the Crown have the right, (as is contended for on its behalf) to take the land of a subject for the purpose of erecting a lighthouse thereon, it can only be in the nature of an easement to maintain the lights, and the toll follows from the grant of the easement. There are many cases strictly analogous to the present: such, for instance, as a market or fair, which can only be held on the land of the owner, but the fran-

(a) 1 Ambl. 367.

(b) 4 Ves. 542.

(c) Id. 430, in note.

(d) 1 Coll. 381.

(e) 9 Beav. 450.

(f) Co. Litt. 20. a.

(g) 2 Ves. jun. 651.

1849;
 ATT.-GEN.
 v.
 JONES.
 —
Argument.

chise may be held by one person, notwithstanding the land on which it is held has passed to another; and in the case of the grant of a fair to be held on land of borough English tenure, the right to the market will pass to the heir at common law, and the land to the heir in borough English (*a*). The cases of *Curwen v. Salkeld* (*b*), *The King v. Cotterill* (*c*), and *Dixon v. Robinson* (*d*), have established this point, viz. that the grantee of a fair is not bound to hold the fair in any particular place within the manor, provided the parties attending the fair are not inconvenienced: and it is absolutely necessary that the grantee should have power to go upon the land; and according to the case of *The Mayor of Northampton v. Ward* (*e*), whoever will have a stall in a market must have a licence for that purpose from the owner of the soil. It is impossible to distinguish the cases of a fair or a market from the present case. These tolls will, moreover, pass by fine (*f*). Next, as to the authorities cited having reference to the poor laws. By the Stat. 43 Eliz. c. 2, the overseers are authorised to levy rates on the lands occupied within the parish. According to *The King v. Rebow* (*g*), and *The King v. The Inhabitants of Tynemouth* (*h*), neither of the Defendants were inhabitants within the parish, and tolls were held not to be rateable *per se*. The observations of the learned Judges in the case of *The King v. Coke* (*i*), are in every respect applicable to the case of a canteen, which closely resembles the present. The Defendants have, therefore, the opinions of at least Mr. Justice *Holroyd* and Lord *Abinger*, C. B., clearly in their favour, and to the effect that these tolls are chattels real. Then the funds in Court represent partly the value of the island, and partly the franchise

(*a*) *Heddy v. Welhouse*, Moore, 474.

(*b*) 3 East, 538.

(*c*) 1 B. & Ald. 67.

(*d*) 3 Mod. 108.

(*e*) 1 Wils. 107 ; 2 Str. 1238.

(*f*) 5 Cruise's Dig. 132.

(*g*) Cowp. 583.

(*h*) 12 East, 46.

(*i*) 5 B. & C. 797.

How are the respective values to be ascertained? *Radburn v. Jervis* (a), *Aubin v. Daly* (b), and *The Earl of Stafford v. Buckley* (c), are all cases of annuities made descending to the heir at law, although properly personal estate. The probate duty in the provinces of *Canterbury* and *York* is chargeable only in respect of property of which probate is granted; and if the property passes to the heirs, as here, the Ordinary would clearly have no jurisdiction, the site of the property determining the liability to probate duty. If the tolls be not liable to legacy duty, *à fortiori* they are not subject to probate duty, and if the Act 55 Geo. III, c. 184, be not clear and certain in its provisions, the Defendants pray, in aid of the subject, to be held exempt from all duty.

1849.
 ATT.-GEN.
 v.
 JONES.
 —
 Argument.

The *Solicitor-General* replied.

The LORD CHANCELLOR:—

The point which the Court is called upon to decide in this case is, whether the profits arising from the tolls received under a grant of a lighthouse are to be considered as personal estate or as real estate. The question whether they are liable to legacy duty, depends on whether the property is to be considered in its character or nature as realty or as personalty.

Dec. 15th.
 —
 Judgment.

There is no great doubt or difficulty as to the principle: the question is as to the application of it to the particular facts of the present case, because there are so many instances in which extraordinary profits incident to the enjoyment of land are considered as part of the land, and therefore realty, that the question depends altogether upon the connexion which these profits bear to the land itself.

(a) 3 Beav. 461.

(b) 4 B. & Ald. 59.

(c) 2 Ves. sen. 171.

1849.
 ———
 ATT.-GEN.
 v.
 JONES.
 ———
Judgment.

If the matter be an addition or accretion to the profit of the land, no doubt it goes with the land. If, on the other hand, as is contended for on the part of the Crown, it is a mere personal licence,—a personal franchise and liberty granted by the Crown to the individual, though necessarily requiring some connexion with the land, in order to produce the light for which the toll is payable,—then it is said that it must be considered as a mere personal benefit, and of course, as such, it would be personalty, although the estate in that personalty be limited to heirs; it would be a fee simple personal, as Lord *Coke* describes it.

When I come to observe on the language of some of the Judges in the cases which have been referred to, it is most important to bear in mind the provisions of the grant and of the Act of Parliament. The present title is under an Act of Parliament, and that Act refers to a previous grant; and therefore the relationship between these profits and the lighthouse itself depends, in a great degree, on that grant. And it appears that, in former times, an individual, having a term in an island on the coast, obtained a grant of a lighthouse to be erected upon that island; and the grant, which is recited in the Act, states that the party at that time entitled to the term in the rock or island called *Skerries*, “was willing, at his own expense and charge, to erect and build, and to support and maintain, a lighthouse or beacon thereon, as aforesaid.” Then it proceeds to grant to the party so entitled to this rock or island “all that the free liberty, licence, power, and authority of erecting, supporting, and maintaining a lighthouse or lighthouses, beacon or beacons, with lights to be continually burning therein in the night season, upon the said island or rock,” for the term of sixty years. So that the term for which the licence or grant was obtained, was concurrent with the grantee’s interest in the island or rock itself. It then provides, that in case *Trench* (who was the

party to whom it was granted) “shall not, within the space of five years next ensuing after the date of these our letters patent, erect and build, or cause to be erected and built, the said lighthouse or lighthouses, or shall at any time afterwards during the said term suffer the same to run to ruin and decay, or shall not keep and maintain a light or lights continually burning therein in the night season, for the benefit of shipping, according to the true intent and meaning of these presents, then, and in such case, this our present grant shall be void and of no effect.” —That is the grant.

1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

The Act of Parliament was passed before the expiration of the term of sixty years already mentioned, but provides for what should take place after the expiration of that term. It recites the grant, and that *W. Trench*, pursuant to the power given him, did actually erect and build a lighthouse on the rock or island, and that the lighthouse had been and was of constant use and benefit. It then recites that *W. Trench* had charged the property in the lighthouse with certain debts; then, after stating the title, the recital is in effect as follows, viz. that *Sutton Morgan* was then in possession of the said lighthouse; that the expense of maintaining the same had amounted to much more than the duties annually collected; that *W. Trench*, during his lifetime, supported and maintained the lighthouse almost to the utter ruin of himself and family; that *Morgan* had, since he had possession thereof, maintained and supported the same as far as in him lay, and had borrowed sums of money over and above the money arising by the duties granted by the letters patent, but was no longer able to support the same; and the lighthouse (though of very great use and benefit to the public) must inevitably fall to ruin and decay, unless the duties were extended; that the equitable right to the letters patent

1849.
ATT.-GEN.
v.
JONES.
—
Judgment.

and to the lighthouse was vested, as aforesaid, in *Morgan*, his heirs and assigns; that it was judged absolutely necessary that the lighthouse should be preserved and kept up from and after the term of sixty years; and in consideration of the great expense *Trench* was at in building the same, it was thought just and reasonable that *Morgan*, his heirs and assigns, should for ever have the keeping up and supporting of the lighthouse, which could not otherwise be effected but by the aid of Parliament. Then, in order to enable *Morgan*, his heirs and assigns, to maintain and keep the lighthouse in sufficient repair, and the lights therein continually burning in the night season, and also to pay the debts charged upon it, it enacts—"that all and every the powers, liberties, privileges, authorities, and duties granted in and by the said letters patent, and the said lighthouse, and all other rights, members, and appurtenances therewith occupied and enjoyed, shall be, and are hereby declared to be, firm, valid, and effectual to all intents and purposes whatsoever, and the same are and shall be valid, and have continuance from and after the expiration of the said term of sixty years (thereby granted to the said *William Trench*, his executors, administrators, and assigns), for ever; subject, nevertheless, to the proviso as to the maintaining of the said lighthouse in the letters patent contained, and to the trusts hereinafter mentioned, and shall be fully and absolutely vested in the said *Sutton Morgan*, his heirs and assigns." By a subsequent clause, *Sutton Morgan*, his heirs and assigns, from and after the 24th of June, 1730, are authorised to receive the tolls upon the ships passing the lighthouse. Then there are other provisions, regulating the amount of tolls; and then comes the following enactment:—"And it is hereby further enacted and declared that the said lighthouse is hereby vested in the said *Sutton Morgan*, his heirs and assigns, to the intent and pur-

pose that he the said *Sutton Morgan*, his heirs and assigns, shall, from time to time, keep and maintain the said lighthouse in good and sufficient repair, and shall, in the night season, maintain a proper fire therein, so as the trade and navigation in that channel may be effectually preserved.”

1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

The result therefore is, that, with those additional provisions, the Act adopts all the provisions in the letters patent, and continues them, after the expiration of the sixty years, for ever in the grantee and his heirs: not the franchise,—the privilege only,—but the lighthouse itself, with the right and duty of keeping a light burning therein.

The question then is, the house itself being clearly real property (and about that there is no contest), whether the privilege of receiving tolls, on condition of keeping up the light, is an incident or addition to the income or profit arising from the house; or whether it is a totally distinct and independent personal franchise, which, in that case, would be personalty, and not realty. First of all, if that be personalty, although it be limited to heirs, it may still continue personalty; we must look to the authorities which draw the distinction where the two interests of realty and personalty seem rather to merge one into the other. For instance, a personal annuity granted to a man and his heirs, where the heir of realty is the party to whom the limitation is made, seems to look towards realty. It is, however, considered not as realty, but as personalty. But the reason assigned, when that question has arisen in former times, is, that it has nothing to do with land—it is made inheritable as land is inheritable, but it has nothing to do with land; and if it has anything to do with land, the reason assigned why that is considered as personalty and not realty, fails. If it has, in the particular case in question, nothing to do with land, or, as Lord *Thurlow*

1849.
 ATT.-GEN.
 v.
 JONES.
 ———
Judgment.

expresses it, in *Lady Holderness v. Lord Carmarthen*^(a), “does not savour of lands,” then it is mere personalty.

Such is the nature of the grant—for it is a grant in terms; and though the title is not derived from the Crown to the island itself, yet the Act of Parliament vests the island in the individual, with the duty of erecting a lighthouse there, and keeping the light burning; and the privilege, in consideration of the benefit derived to navigation from such a light being kept burning, is that of receiving certain tolls from vessels that pass by. Now, in this case, the title to the profit depends upon the title and user of the house. The title and user of the house confer the right to the profits. This is a very common thing—all extraordinary profits, incident to and dependent upon a title and user of land, are part of it—such, for instance, as a soke-mill. In that case there is land—the mill is real property—it is so by custom. The only distinction will be found to be between custom in one case and a Royal grant in the other. By custom, this piece of landed property has certain duties imposed on it; that is to say, the owner of a soke-mill is bound to keep it in a proper state to grind the corn of those who are within the sphere of the custom; but, in consideration of the performance of that duty, it has the privilege of monopoly, and of preventing others from interfering with that right; and therefore it has a duty imposed by custom, which of course originates in some contract. But the result is, that, in law, it has a duty imposed on it for the benefit of the public, with respect to which the public are subject to certain liabilities, in order to remunerate the parties by whom that duty is performed. The mill itself is probably of very little value, compared with the value that attaches to it by reason of the existence of this custom in its favour, because it then has the benefit

(a) 1 Bro. C. C. 377; vide p. 382.

of the right to receive all the profits that arise from grinding corn within the limits to which that custom applies.

1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

The same observation will apply to many other privileges and franchises, which, though they touch the land, and are connected with it, yet the connexion is very slight, and they are only real property because they require the use of land for their enjoyment. As regards fairs and markets: no doubt, generally speaking, markets are connected with manors, but not necessarily or inseparably so. The right to the franchise may exist without it. A party has a right of market within certain limits; and so little connected is that right with the actual enjoyment of a particular spot of land, that, within the limits of the franchise, the party may move his market. Whether he can get leave from the proprietor of the soil is quite a distinct matter. There is the privilege, which he derives from the Crown; within the limits which the Crown has prescribed to him, he may hold that market when and where he can. There is no doubt a market cannot be enjoyed,—the public cannot have the benefit of it, and the owners cannot have the profits of it—unless with the use and occupation of certain land; but that is the only connexion that the right of market has with the land.

The passage from *Coke Littleton* (a), which was referred to in the course of the argument, draws the distinction, and gives some instances; and it appears that the slightest possible connexion with land is sufficient to invest the franchise with the benefit and character of realty. He assigns that as a reason why peerages are descendible, and are considered as real property, merely from the circumstance of a place being named, though the party to whom the dignity is granted has no connexion whatever with, and no profit or interest in, the land itself. This might appear to

(a) 20. a.

1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

be very plain, and to leave no doubt whatever that this ought to be considered as an incident to the land, and therefore partaking of the character of the land; and I can see nothing to raise a doubt. But certain cases have been cited in which this matter has been discussed and commented upon by very learned Judges: I mean those cases in which the question has arisen, whether property of this description is rateable. But, so far as I have been able to understand those cases, the question has been, not whether the subject-matter was rateable at all, but whether it was rateable within the parish in which it originated—in which the building was situate—from whence the light was to proceed.

The last case that has been referred to, in which the matter appears to have been most elaborately considered, is that of *The King v. Coke*(a); but it is to be observed, that there the decision ultimately turned upon the question, whether the parish in which the lighthouse stood, was the parish entitled to the benefit of the rate upon the profits incident to the enjoyment of the rents of the lighthouse; namely, tolls taken from vessels not coming within the precincts of the parish. Undoubtedly, that is what the Judges decided, and that also has been the subject determined in the other cases. Now, that being the point which they so decided, if that had been put forward as the only ground, it would have superseded all other considerations; and it was quite unnecessary to consider what might be the effect of the profits being rateable or not, provided they had been enjoyed within the limits of the parish. As they had decided that they were not subject to the rate, because the tolls had not been received within the parish, then the question, whether they were realty, or whether they were personalty,—whatever might be their character in some other parish,—would not be a matter at all calling for the decision of the Court. I have looked through the judg-

(a) 5 B. & C. 797.

ment very carefully, because, no doubt, the learned Judges who gave their opinion, were Judges peculiarly entitled to have great weight attributed to what fell from them, and not likely to let fall opinions lightly formed, though not immediately amounting to a judicial decision. Those Judges were Mr. Justice *Bayley*, Mr. Justice *Holroyd*, and Mr. Justice *Littledale*. In examining Mr. Justice *Bayley's* opinion, of course I must do so without any reference to the matter before him as to the locality. There may be some difficulty, whilst reading the report of the case, in reconciling what he assumes to be the facts, with what the facts are reported to be; but, for the present purpose, namely, of ascertaining what Mr. Justice *Bayley's* view was on the subject which I have now to decide, I must look to the terms which he uses; and the question, whether or not he has accurately borne in mind how far the facts of the case fall in with the proposition which he states, would not at all affect the weight of the expressions he there uses. Now, he throughout seems to assume, in that particular case with which he had to deal, that the right and privilege to the franchise was totally distinct from the right to the house; and there are many expressions, some of which I shall have to refer to, in which not only is that shewn to be his view, but he seems to assume, that, if it were otherwise,—if the enjoyment of the privilege were directly connected with, and proceeding from, the occupation of the premises,—that then the rule would be different. If that be so, although his decision was one way, the doctrine on which he proceeded would appear to be very clearly the other: for in one passage, after alluding generally to the benefit arising from the use of real property, he describes it as the value which the land had acquired from being so used. He then distinguishes that general proposition from the particular case which he had had before him. He then instances the case of the New River Company; and that raises a question, certainly of very great

1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

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1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

1849.
 ATT.-GEN.
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 JONES.
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(a) 5 B. & C. 797.

ditional value from a licence being so obtained, the whole realty consists of the value of the house, increased by the particular benefit arising from the use to which it is to be applied,—not on account of anything connected with the house originally, but by virtue of that licence which has been granted by a totally distinct authority, and has proceeded from a totally distinct channel.

1849.
 ATT.-GEN.
 v.
 JONES.
 Judgment.

In that case, to which I have already referred, Mr. Justice *Littledale* says (a), “Tolls, *per se*, are not rateable. But in some cases where they arise from and are so far connected with a house or land, that the land or house which gives occasion to the toll, is made more valuable in itself, that increased value, depending upon and being regulated by the profits produced by the toll, is the subject of rate.” So that, in looking through the opinion of those learned Judges, it appears to me to be clear, (whether they were right or wrong is immaterial), that they considered the question to depend on this, viz. whether the additional value attaching to the enjoyment of the privilege, was or was not attached to and connected with the building,—the real property,—which real property they said was not at all connected with the privilege in the case they were considering.

In the present case, it is immaterial whether those learned Judges were right or wrong in that supposition; but when I look to this Act of Parliament, I find that the privilege is granted in consideration of erecting the house originally; and then the Act recites, that the party had performed his condition by erecting the house, and that he had incurred great loss, and had been put to great expense in building the house, which the tolls (as they then stood), were not sufficient to repay; and when I find that if he did

(a) Page 812.

1849.
 ATT.-GEN.
 v.
 JONES.
 —
Judgment.

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(a) 5 B. & C. 797.

has the toll so attached to it and dependent upon it, that the whole must be considered as real property, and therefore not subject to legacy duty. That, of course, will decide the other question, as to the liability of the lighthouse to probate duty, which has circumstances connected with it, which, even if I had held a different opinion touching the liability of the lighthouse to legacy duty, would have prevented its being subject to the probate duty. My opinion, therefore, that the lighthouse is not liable to legacy duty, necessarily carries with it the question as to probate duty.

1849.
ATT.-GEN.
v.
JONES.
Judgment.

ONSLOW v. WALLIS.

Nov. 21st &
22nd.

BY indentures of lease and release, dated in July, 1837, *A. L. Sarel* conveyed some freehold hereditaments to *Wallis*, in fee simple, upon trust to convey them to such persons and in all respects as *Louisa Sarel*, the wife of *A. L. Sarel*, should by deed appoint; and in default of appointment, upon trust to apply the rents for her separate use during her coverture; and after the decease of her husband, in case he died in her lifetime (an event which happened), then upon trust to convey the hereditaments to the use of *Louisa Sarel*, her heirs and assigns; but if she should die in the lifetime of her husband, then the trustee was to stand seised of the hereditaments in trust for the executors and administrators of *Mrs. Sarel*, as part of her personal estate.

A testatrix equitably entitled to an estate in fee, devised it to her executors in trust to sell. The proceeds of such sale, and her personal estate, were to form a general fund for the payment of her debts, &c., and the legacies given by her in a certain paper marked A. The testatrix died without heirs, and the paper A. could not be found; but there were some debts which were unsatisfied:—*Held*, that the trustee of the legal

Wallis died in April, 1842, whereupon the hereditaments in question descended to his eldest son, the Defendant in this suit.

estate was bound to convey to the devisees, without reference to the purposes for which the conveyance was required; and that he was not entitled to retain the estate upon paying the debts of the testatrix.

1849.
ONslow
v.
WALLIS.
—
Statement.

Mrs. *Sarel* survived her husband, and died in September, 1847. The answer alleged, that she died without an heir. She had made a will in June, 1847, by which she devised certain hereditaments to one of the Plaintiffs in this suit, in fee, and then continued as follows: "I give certain legacies, which I have mentioned and specified in a certain memorandum, in writing, marked with the letter A., and signed by me, which I direct my trustees and executors, hereinafter named, to pay out of my personal estate. I give, devise, and bequeath all other the messuages, lands, tenements, hereditaments, and real estate, and all the personal estate and effects of or to which I shall at my death be seised, possessed, or entitled at law or in equity, unto [the Plaintiffs], their heirs, executors, administrators and assigns respectively, on trust that they and the survivor of them, and the heirs, executors, administrators or assigns of such survivor, do and shall, with all convenient speed, make sale and absolutely dispose of and convert into money, and call in and receive all the same real and personal estate respectively, and do and shall stand possessed of and interested in the monies to arise from the sale thereof, in trust, in the first place, to pay thereout all costs, charges, and expenses of and attending the execution of the trusts of this my will, and my debts, funeral, and testamentary expenses and legacies; and then in payment of the legacies given by me in a certain memorandum, signed by me, and marked with the letter A."

The memorandum marked with the letter A. had not been discovered.

It was alleged by the bill, and admitted by the answer, that there were debts of the testatrix, which her personal estate was not sufficient to pay. The trustees under the will applied to the Defendant to convey the hereditaments to them as such trustees; but he insisted that he was en-

titled to hold them for his own benefit, subject to the payment of such portion of the charges created by the will, as were properly chargeable thereon, and which he offered to pay.

1849.
 ONSLOW
 v.
 WALLIS.
 ———
Statement.

The bill prayed that the Defendant might be decreed to convey and assure to them, as such devisees as aforesaid, the hereditaments comprised in the deeds of July, 1837.

The cause was heard by the *Vice-Chancellor of England*, on the 16th January, 1849, when he ordered a conveyance to be executed by the Defendant, according to the prayer of the bill.

The Defendant now appealed from that decision.

Mr. *Humphry* and Mr. *Bird* for the Plaintiffs.

Argument.

In *Burgess v. Wheate* (a), this Court refused to compel a trustee, whose *cestui que trust* had died without an heir, to execute a conveyance to the grantee of the Crown; and in *Williams v. Lord Lonsdale* (b), the Court also refused to compel the lord of the manor to admit the heir of a trustee, whose *cestui que trust* had died without heirs. If, therefore, Mrs. *Sarel* had not made any disposition of this property by will, this Court would not have interfered with it in any manner, for the benefit of *Wallis*, as a trustee without any duties to perform.

But the devisees in this case have certain duties to perform. The testatrix constitutes one fund for the payment of her debts and legacies, which fund is to be raised from her real and personal estate: *Roberts v. Walker* (c), *Bough-*

(a) 1 W. Bl. 123; 1 Eden, 177.

(b) 3 Ves. 752.

(c) 1 Russ. & My. 752.

1849.
 ———
 ONSLOW
 v.
 WALLIS.
 ———
Argument.

ton v. Boughton (a). A sale of the real estate is therefore necessary, in order to ascertain the proportion in which it ought to contribute to the mixed fund, and the amount of the legacy duty payable in respect of it: *The Attorney-General v. Holford* (b), *Williamson v. The Advocate-General of Scotland* (c). It is a stronger case than *Bootle v. Blundell* (d), where the real estate merely came in aid of the personal estate. If the memorandum marked A. were found, could the trustee keep the estate without paying the legatees? Or is he for this purpose to assume the trusteeship which by the will was confided to other parties?

[The LORD CHANCELLOR.—If a testator devises an estate upon trust for A. B., and A. B. dies before the testator, can the trustees obtain a decree from this Court to have the estate conveyed to them upon trusts which are non-existing? In this case, the trust cannot be carried out so long as the paper A. cannot be found. It is a contest between the two trustees, who shall keep the surplus. If the present trustee once executes a conveyance, he can have no equity to have the estate reconveyed to him, if there should be a surplus after payment of the debts, &c.; and if there is a surplus, what better right have the devisees under the will to keep it?]

There are trusts and duties still to be performed for the payment of debts. But even if there were no such duties, the trustee under the settlement has no claim to keep the estate. He took it upon trust to convey it to Mrs. Sarel or her assigns. The Plaintiffs claim it as her assigns. If she had merely directed it to be conveyed to the Plaintiffs, without mentioning any purpose, the trustee could

(a) 1 H. L. Ca. 406, 428, and cases cited there.

(b) 1 Price, 426.

(c) 10 C. & F. 4.

(d) 19 Ves. 517; 1 Mer. 193.

not have refused to execute a conveyance to them in compliance with that direction. The heir-at-law is entitled to all which is not taken away from him; but this trustee has nothing but what was given to him, namely, the legal estate, and he is not entitled to anything further.

1849.
 ONSLOW
 v.
 WALLIS.
 —
Argument.

Mr. *Rolt* and Mr. *Prior*, contra.

It is contended that the Defendant is a mere naked trustee, and is therefore not entitled to any assistance from the Court. But he is not the party who asks for any help from the Court. He is brought here by the Plaintiffs, whose title is not better than his own. In *Burgess v. Wheate* (a), Lord *Northington* says, "My objection to the claim is, that it is for the execution of a trust that does not exist." The heir-at-law might clearly say, "I will pay off the charges on the property, and keep it, without allowing it to be sold." The Defendant makes the same offer. The devise is of the fee simple; but the trusts do not require so extensive an estate, and the Court does not give trustees a larger estate than is necessary to enable them to perform the trusts. The title of the devisee to the surplus, (if any), was sustained in *Taylor v. Haygarth* (b), *Henchman v. The Attorney-General* (c).

The Crown has no equity to compel the parties to sell the estate, merely for the purpose of ascertaining the legacy duty.

Mr. *Humphry* was not called upon to reply.

(a) 1 Eden, 250.

(b) 14 Sim. 8.

(c) 3 My. & K. 485.

1849.

ONslow

v.

WALLIS.

Nov. 22nd.

Judgment.

The LORD CHANCELLOR:—

No case similar to this has been cited, where the owner of property which was on trust, has given it to somebody else; and whether it was so given beneficially or not, is a question which the Defendant has no right to inquire into. It is not like the case of *Burgess v. Wheate* (a). The only reason why the trustee, under such circumstances as existed in that case, is allowed to hold property, is because there is nobody to take it from him; it does not belong to any person whom the law recognises as having a right to ask for the execution of the trust. Now here the original owner undoubtedly had a right, as against the trustee, to direct what he should do with the property: he was a mere naked trustee. The testatrix in this case had a right to do what she pleased with the beneficial interest, and she did by her will direct the legal estate to be conveyed, or at least gave the property, to the trustees of her will. The question is, whether the Defendant, who appears to be the trustee of the legal estate, has any right to inquire for what purpose these parties are to hold the trust property. It is a gift, in trust, it is true; but it is the appointment of persons who are to stand in the place of the original owner, as against the trustee. Then why is the beneficial interest, which is by the operation of the rule of law, in *Burgess v. Wheate*, to enure to the benefit of trustees, to enure to the benefit of this trustee? There is no want of persons authorised, as against him, to require a transfer of the beneficial interest. Suppose the testatrix had simply directed that the estate should be transferred, and had appointed new trustees, and directed the existing trustee to convey to those who are trustees under the will, could the trustee of the legal estate dispute the title of the trustees under the will, because they might or might not have the means of carrying into effect the trusts of the will?

(a) 1 Eden, 177; 1 W. Bl. 123.

The real question is, whether it is regulated by the doctrine in *Burgess v. Wheate*. I think that it is not regulated by the doctrine in *Burgess v. Wheate* at all, because that case proceeds on the fact of there being no persons having a right to control the legal estate, and here there are persons authorised to control the legal estate.

1849.
 ONSLOW
 v.
 WALLIS.
 Judgment.

I do not take exactly the view which the *Vice-Chancellor* seems to have done, because he seems to have considered that the matter would depend on the presumed intention of the testatrix. For that purpose, you are to assume she intended that the paper A. should not be produced, and therefore there would be a failure of her declared intention. Therefore, if there is any trustee who is to have the benefit of the doctrine in *Burgess v. Wheate*, the trustees under the will are to have it. It cannot be considered that the testatrix had any such view at all. It must be presumed, she intended that the purposes declared by her will should be carried into effect. Those purposes have failed, in consequence of that paper A. not being produced; it may be produced hereafter, or it may not. I do not proceed on that ground, but I proceed on this,—that there are persons appointed by the owner of the property, to whom the property is to be conveyed. They are the only parties having a right to it; whether or not they have power afterwards to dispose of all the beneficial interest, is a matter with which the Defendant *Wallis*, as mere owner of the legal estate, has nothing whatever to do.

This seems to me to be a case which does not fall within the doctrine of *Burgess v. Wheate*, so far as the Defendant *Wallis* is concerned; and therefore the direction of the *Vice-Chancellor* for a conveyance, under the terms of the will, is, I think, a proper decree, and it must be affirmed, with costs.

1849.

Nov. 26th.

BERRY v. THE ATTORNEY-GENERAL

In an administration suit, the Master found that the testator's estate was insufficient to pay all the legacies in full, and on further directions they were ordered to abate proportionally. One of the legatees, who was not a party to the suit, being dissatisfied with the accounts taken in the Master's office, presented a petition of rehearing, and obtained an order of course. The petition having been presented without the prior leave of the Court, was held to be irregular, and was ordered to be taken off the file.

—
Statement.

THIS was a motion on behalf of the Plaintiff, that an order made on the 2nd of July, 1849, for the rehearing of the cause on further directions, might be discharged, and that the petition of rehearing might be taken off the file.

The suit was instituted for the administration of the estate of a testator, and the only Defendant was the *Attorney-General*, who would be entitled, on behalf of the Crown, to any residue of the testator's estate, he having died without any next of kin. The Plaintiff was a legatee, and also the personal representative of the testator.

The cause was heard before the *Vice-Chancellor of England*, who referred it to the Master to take the usual accounts of the testator's estate, and of his debts, legacies, &c. It appeared, on taking the accounts, that the testator's estate was not sufficient to pay all his legacies in full; and by the order made on further directions, they were ordered to abate proportionally if necessary.

One of the legatees, who was not a party to the cause, thereupon presented a petition of rehearing, in which she alleged that there were several errors in the accounts which had been allowed by the Master, and she obtained an order, as of course, on the 2nd of July, 1849, that the cause should be reheard before the Vice-Chancellor *Knight Bruce*. This was the order which the present motion sought to discharge.

—
Argument.

Mr. *James Parker* and Mr. *Torriano*, in support of the motion.

The order ought to be discharged,—

First, Because it directed the cause to be reheard before Vice-Chancellor *Knight Bruce*, whereas the cause was originally heard before the *Vice-Chancellor of England*.

1849.
BERRY
v.
ATT.-GEN.
Argument.

Secondly, Because it was obtained by a person who was not a party to the cause, and who ought, therefore, to have applied to the Court for special leave to present a petition of rehearing; but as she has presented the petition without any such leave, her proceeding was altogether irregular: *Gwynne v. Edwards*(a). The petition did not find fault with the decree, but with the Master's report; and if that was incorrect, it should have been set right by means of exceptions.

Mr. *Malins* and Mr. *Roxburgh*, contra:

First, The name of the Vice-Chancellor *Knight Bruce* was inserted by mistake, and would, of course, be corrected.

Secondly, The estate is insufficient to pay all the legacies, and the *Attorney-General* has, therefore, no interest in checking the proceedings before the Master. The course which the Petitioner adopted is such as is pointed out in *Daniell's Chanc. Prac.*, Vol. 2, p. 1332.

[The LORD CHANCELLOR.—I cannot hear the practice from any text-book. Have you any cases in which the point has been decided?]

Giffard v. Hort(b), and *Brookfield v. Bradley*(c), are authorities in favour of the Petitioner. *Gwynne v. Edwards*(a) was a creditors' suit; and the creditors, who presented a

(a) 9 Beav. 28, 34. (b) 1 Sch. & Lef. 398. (c) 2 Sim. & St. 64.

1849.
 BERRY
 v.
 ATT.-GEN.

Argument.

petition of rehearing, without applying for leave to do so, had availed themselves of the decree, and had attended before the Master.

The LORD CHANCELLOR:—

Judgment.

If it has been decided, that any party who is affected by a decree may, if he pleases, come to the Court to rehear the cause, I must be bound by the authorities. But, as none such are produced, I think this course is clearly irregular. If I affirmed this order, the consequence would be, that any person affected by a decree might, although he was not a party to the cause, have a rehearing. Then, a person, without being party to the suit, might step in and take the conduct of the cause. But, where a decree is obtained, if a person who is not a party steps in, he cannot do it merely by his own act. The Court will not, in this manner, take the conduct of a suit from the party who institutes it; and therefore, the party who wishes to interfere must in the first instance come to the Court and shew a reason why the original Plaintiff should no longer continue to have the conduct of the cause, and he must obtain the leave of the Court to do that which he wishes to do. The case before the *Master of the Rolls* is very apposite; and in the absence of authorities to the contrary, and with the authority of the *Master of the Rolls*, which I conceive quite consistent with the ordinary practice of the Court, I must order this petition to be taken off the file, with costs.

STILES v. GUY.

THE chief question on this appeal was, whether two of the executors under the will of *John Tuckey* were liable to make good to the estate of their testator, a large sum of money which, at the time of the testator's death, was in the hands of a third party, who was also an executor, and who had been allowed to retain the money in his hands for six years, when he became bankrupt, and the money was consequently lost to the testator's estate.

By the decree of the *Vice-Chancellor of England*, which is reported in 16 Sim. 230, the claim against the two executors was sustained, and the money was ordered to be paid into court, together with interest at 4*l.* per cent. from the time of the testator's death.

The will and the circumstances of the case, and also the judgment of Lord *Lyndhurst*, before whom the cause was originally heard, in December, 1832, in the Court of Exchequer, are stated in 4 Y. & C. App. 571.

Mr. *Stuart*, Mr. *James Parker*, and Mr. *Heathfield* appeared in support of the appeal; and

Mr. *Bethell*, Mr. *Rolt*, Mr. *Pitman*, Mr. *Bevir*, and Sir *Walter Riddell* for other parties.

The LORD CHANCELLOR:—

The testator, in this case, had been accustomed for many years, and up to the time of his death, to employ *Anthony Guy*, a solicitor, not only in his professional capacity, but as

1848.

Nov. 10th & 11th.

1849.

Nov. 12th.

A person who, at the death of a testator, had part of the testator's estate in his hands, and who was appointed one of his executors, was allowed by the co-executors to retain the monies in his hands, and afterward became bankrupt. The co-executors were held liable to make good the loss to the testator's estate.

The liability of executors to make good a loss is regulated by the same principles, whether the loss arises from their omitting to call in a debt due to the testator's estate, or from their allowing a balance to remain in the hands of a co-executor.

An executor is not protected merely by passiveness from liability on account of a *derastavit* committed by his co-executor; but it is the duty of co-executors to watch over, and, if necessary, to correct the conduct of each other.

CASES IN CHANCERY.

1744
—
1745
v.
GUY.
—
Judgment.

agent in the management of his pecuniary affairs, much in the character of a banker. He left large sums of money in his hands, not as incidental to his employment as a solicitor and agent, but upon loan, at interest, without security, and simply upon his notes or accountable receipts; and the whole balance, at the time of the testator's death, amounted, as the Master's report finds, to 12,981*l.* 5*s.* 4*d.*

The testator appointed this *Anthony Guy*, *Richard Tuckey* the younger, the testator's nephew, and *Richard Tuckey*, one of his sons, executors and trustees of his will. The will does not take any notice of the connexion with *Anthony Guy*, or of the debt due from him; but it directs the executors, as soon as conveniently may be after the testator's decease, to sell and convert into money all such parts of his property as should not consist of monies or securities for money, and to call for, receive, and get in all such part or parts thereof as should consist of book debts, or securities for money not approved of by them; and after directing them to retain 50*l.* each, as a small compensation for their trouble, and directing the payment of his debts, he gave one-seventh part of the residue to his son *Richard*, and directed his executors to place out and invest the remaining six-sevenths in or upon any of the parliamentary stocks or funds, or on real securities, in *England*; and one of those six-sevenths he gave to each of his children and their families. The particulars of those gifts are not material, inasmuch as infants are interested in all those shares; and that circumstance, so far as the capital is concerned, excludes all question as to acquiescence on the part of the *cestuis que trust* of the capital, in the *devastavit* for which compensation is sought in this suit. He directed that all advances made by him to any of his children should be taken as part of their shares.

The testator died in September, 1823. All the three exe-

cutors proved, but *Anthony Guy* appears to have principally acted in the trusts of the will. The correspondence shews, that no one of the family interested under the will, nor either of the other executors, was acquainted with the state of *Anthony Guy's* account with the testator's estate; but, that he had large funds belonging to that estate in his hands, must have been known,—several of the tenants for life applying to him for and receiving from him payments on account of what was coming to them, and he having, in December, 1825, paid *Richard Tuckey*, the son, 3200*l*.

1849.
 STILES
 v.
 GUY.
 Judgment.

The family soon became impatient at their not being able to ascertain the state of the testator's property, but do not appear to have entertained any suspicion of the solvency of *Anthony Guy*. The letters shew, that *Richard Tuckey* the son, so early as the 8th of December, 1824, and *Richard Tuckey* the younger, so early as 11th January, 1825, applied to *Anthony Guy*, and pressed him for a settlement of the testator's affairs. Applications for this purpose were often repeated by the co-executors, and by different members of the family, but were always evaded by *Anthony Guy*, until the original bill in these causes was filed in March, 1829, by *Joanna Stiles*, one of the testator's daughters, and her children. On the 23rd of July, 1829, an order was made upon *Anthony Guy's* answer, for payment into court by him of 6100*l*., on account of the testator's estate, on or before the 6th of November; and this time was afterwards, without the knowledge of the co-executors, enlarged by an order of the 12th November, 1829, to the 18th January, 1830. But on the 22nd November, 1829, *Anthony Guy*, being insolvent, absconded, and was afterwards declared a bankrupt; and in November, 1830, a supplemental bill was filed, stating the case against his co-executors, *Richard Tuckey* the younger, and *Richard Tuckey* the son.

1849.
 STILES
 v.
 GUY.
 —
Judgment.

By the original decree of the Exchequer, in December, 1832, the usual accounts were directed to be taken; and it was referred to the Master to inquire, first, whether any of the adult parties had acquiesced in the debt due from *Anthony Guy* at the time of his death not being called in; secondly, whether, if *Richard Tuckey* the younger, and *Richard Tuckey* the son, had taken measures to call in the debt, it might or could have been recovered; and thirdly, whether the enlargement of the time for paying the 6100*l.* into court had been ordered without the knowledge or consent of *Richard Tuckey* the younger, and *Richard Tuckey* the son, and whether, if such enlargement had not taken place, the money might or could have been recovered.

The first inquiry the Master answered in the negative, finding that none of the adult parties acquiesced in the debt due from *Anthony Guy* to the testator, at the time of his death, not being called in. This was the only part of the Master's findings disputed by exceptions, which asserted the affirmative. These exceptions the *Vice-Chancellor* overruled, and I think most properly. The acquiescence to be inquired into could only consist of what would be tantamount to an approval of the debt due from *Anthony Guy*, remaining in his hands: whereas the evidence and correspondence prove that all parties were kept in ignorance as to the state of the account between *Guy* and the estate, and that all were anxious, and earnestly pressed for a statement and settlement of the account. It is true, it appears that the parties were aware that large sums were in his hands, and that they received, on account of their life income, various sums of money from *Anthony Guy*; and to this extent the Defendants, the other executors, are entitled to the benefit of such fact: but that is very far from establishing the affirmative of the inquiry. The appeal, therefore, so far as it complains of the judgment upon the exceptions, must be dismissed.

As to the second inquiry, the Master finds that no party had brought any statement before him, although he had, at the instance of the Plaintiff, called upon the Defendants to prosecute the same; and as to the third inquiry, he finds that the enlargement of the time for paying in the 6100*l.* was made without the knowledge or consent of the co-executors; but that, if no such enlargement had taken place, the money could not, after the 6th of November, 1829, have been recovered from *Guy*.

1849.
 STILES
 v.
 GUY.
 ———
Judgment.

These causes having come before the *Vice-Chancellor of England*, upon exceptions and further directions, his Honor, by an order of 3rd June, 1848, after overruling the exceptions, declared that the Appellants, *Thomas Tuckey* and *Elizabeth Rhodes*, the representatives of the late Defendant *Richard Tuckey* the younger, and the Defendant *Richard Tuckey* the son, ought to be charged with the sum of 12,981*l.* 5*s.* 4*d.*, the amount found by the Master to be due from *Anthony Guy* to the testator at the time of his death, and they were ordered to pay the same into court; and that they ought to be charged with interest upon the same, at 4*l.* per cent., from the testator's death to the time of payment; and it appearing that various sums of money had been paid by *Anthony Guy* to the legatees for life, the Master was directed to inquire and state what was due to or from each party in respect of his legacy, and interest, having regard to the advances made, and when and by whom, and under what circumstances the same were made, and what was due to the tenants for life, after deducting the sums already received by them. The report found, that, upon the executorship account, *Anthony Guy* had received 11,387*l.* 7*s.* 7*d.*, and had paid, including payments to the legatees, 6746*l.* 17*s.* 8*d.*, leaving a large balance due from him upon that account; but the decree does not charge the co-executors with such balance.

1849.

STILES

v.

GUY.

Judgment.

The question upon this appeal is, whether the decree is right in charging the co-executors with what was due from *Anthony Guy* at the time of the testator's death, as his solicitor or agent, with interest from that time to the time of payment. The solution of this question must, I think, depend upon general principles, and not upon any particular circumstances of this case. The direction in the will, that the executors should call in securities not approved by them, must be considered as referrible to securities upon which a testator's property might from their nature be invested, and not as authorising a kind of investment which a Court of equity could not sanction. So the confidence which the testator reposed in *Anthony Guy*, and the manner in which he intrusted property to his keeping, cannot be considered as furnishing a rule for a similar mode of dealing with him by the other executors, and evidence of the testator's intention in this respect cannot be attended to; and the knowledge of some of the adult legatees, of *Anthony Guy's* dealings with the estate, which, though not amounting to acquiescence, may be of importance when the claims of each legatee come to be considered, can have no effect upon the question of securing the capital in which infants are interested as well as themselves. I think, therefore, that the general question is raised, how far executors are liable for a debt which was due from their co-executor at the time of their testator's death, which was lost by his insolvency many years afterwards (in the present case six years), and to compel payment of which no suit was instituted until within eight months of the declared insolvency, although frequent applications had from time to time been made for a settlement of the accounts.

Looking to the rules applicable to this subject, which appear to have been recognised and acted upon at the commencement of the present century, there would appear

to be much difficulty in the solution of this question. It was well established, that an executor proving a will, but not further acting, might incur a liability to make good losses arising from his negligence, such as the loss of debts outstanding upon improper security, or from the Statute of Limitations having been permitted to run against them. But it was also well established, and assumed by the highest authority, that a *devastavit*, by one of two executors, would not charge his companion, provided he had not contributed to it. In *Hovey v. Blakeman* (a), which was decided in 1799, Lord *Alvanley* says, "It is very clear an executor may join in the probate with his co-executor, and does not by that and by permitting the other executor to possess assets, make himself answerable for the receipts of the other: he is only answerable by permitting his co-executor to avail himself of the power every executor has, of coming at the assets, and concurring himself in the application of them." In *Lord Shipbrook v. Lord Hinchinbrook* (b), which was decided in the year 1805, Lord *Eldon* puts a case involving this principle, and says, that he is "not sure there would be a principle for charging the executors;" and in *Langford v. Gascoyne* (c), Lord *Eldon* says, "The rule in all the cases is, that, if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other; not where an executor is merely passive, by not obstructing the other in receiving it. But if the one contributes, in any way, to enable the other to obtain possession, he is answerable, unless he can assign a sufficient excuse." In the reported cases, the loss appears to have been of property received by the defaulting executor after the testator's death, and not of a debt due from him before that event; but this cannot furnish any distinction against the co-executor. In the latter case, a debt due from an executor constitutes part of the assets, but the

1849.
 STILES
 v.
 GUY.
 —
Judgment.

(a) 4 Ves. 607.

(b) 11 Ves. 254.

(c) 11 Ves. 335.

1849.

STILES

v.

GUY.

Judgment.

co-executor could not have had any control over it; whereas he had the means of watching, and, if necessary, of interfering with the receipt by the defaulting executor of assets after the death. His being passive cannot be an immunity for him in the case of assets received, and not in the case of a debt retained: and how was this immunity consistent with the admitted liability of all executors for losses from negligence and inactivity in not calling in debts due to the estate? Could passiveness be a protection in the case of property lost in the hands of a co-executor, but an offence in the case of property lost in the hands of other debtors to the estate? The liability in the latter case arises from the soundest principle. If a person named executor does not choose to accept the office, he has only to renounce, or, at least, to abstain from proving. But if he proves, he thereby accepts the office, and becomes bound to perform the duties of it, and is liable for the consequences of his neglecting to perform them. Of these duties, a principal one is to call in and collect such parts of the estate as are not in a proper state of investment. If he knows, or has means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purposes of the will, is it not part of the duty which he has undertaken, to interfere and to take measures, if necessary, for putting such property in a proper state of investment? Or is it no part of his duty, because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for any such distinction; and so it appears to have been felt when the case arose, as it did in *Mucklow v. Fuller* (a), before Lord *Eldon*, in 1821, in which Sir *John Leach*, as *Vice-Chancellor*, and Lord *Eldon*, upon appeal, held *Fuller*, an executor, who had proved, but had not acted, liable for a bond debt due from

(a) Jac. 198.

the other executor, *Mucklow*, before the testator's death, which had remained unpaid, and was lost by his insolvency. It is true, that in that case there was a specific bequest of the bond debt, which the will directed the executors to get in and place upon Government securities within three years, and to hold upon certain trusts; and this was relied upon in argument, and not disregarded in the judgment, a distinction appearing to be taken between the office of executor and trustee; but it does not appear to me that these circumstances prevent that case from involving the principle which must regulate the present. There cannot be one rule applicable to a portion of the estate given to the executors upon particular trusts, and another rule applicable to another portion of the estate constituting the residue given to the executors for the general purposes of the will. In both cases the executors are trustees of the funds which they are to administer for the purposes specified; and their responsibility, with respect to each of such funds, must be the same. In *Booth v. Booth* (a), the question arose before Lord *Langdale*, and he held the passive co-executor liable for property of the testator improperly left in the hands of the acting executor. *Lincoln v. Wright* (b), before the same learned Judge, was not a case of a debt due from a party who was appointed executor, but of assets received by one of three executors and lost, and the others were held liable, not upon the ground of the defaulting trustee having, through any act of theirs, obtained possession of the property, but upon the simple fact of their having permitted the breach of trust, that is, their not having taken effectual measures to correct it and secure the property.

From what I have already said, it will have been seen that I approve of the principle of these decisions, and that I cannot discover any principle for distinguishing be-

1849.
STILES
v.
GUY.
Judgment.

(a) 1 Beav. 125.

(b) 4 Beav. 427.

1849.
STILES
v.
GUY.
—
Judgment.

tween losses by not calling in debts due from debtors to the estate, and balances due from executors. These cases establish that it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other: and the moment that principle is established, all ground of distinction between the two classes of cases ceases.

Finding, therefore, a principle adopted and acted upon for many years and in many decisions, of the justice and grounds of which I fully approve, I cannot feel any disposition to shake its authority, because I cannot reconcile it with *dicta* and doctrines of a much earlier date respecting the security of an executor who is passive.

I have discussed this case much more at large than any difficulty in it would seem to warrant, because I thought it material to draw the attention of those who may hold the office of executors, to the consideration that they cannot safely rely upon what they may find in the earlier cases, laying it down that a *devastavit* by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it. The later authorities to which I have referred, must shew them that passiveness will in many cases furnish no protection, but that negligence and inattention in not interfering with and taking proper measures to prevent or correct the improper conduct of their co-executor, may subject them to responsibilities from which the language of the earlier cases might lead them to suppose they were exempt. The co-executors appear in this case to be free from any moral blame: they derived no benefit, but have suffered much from the breach of trust of *Anthony Guy*; but they knew that part of the testator's property remained in his hands, and that it was therefore not in a proper state of investment. They knew, therefore, that a breach of trust by him was actually in operation; and excepting some unprofitable applications

for accounts and a settlement, nothing was done by them to secure the property so known by them to be in peril.

I am therefore of opinion, that they have been properly held liable to make good the loss: and the decree is, I think, right as to interest. What *Anthony Guy* paid, including payments to the family, appears to have been much less than what he received as executor, independently of the debt due from him at the testator's death. If the Defendants have any remedy against the shares of any of the legatees, the time to consider it will be after the report upon the reference.

The appeal must therefore be dismissed, with costs.

1849.
STILES
v.
GUY.
Judgment.

CHRIST'S HOSPITAL v. GRAINGER.

THIS was an appeal from the decision of the *Vice-Chancellor of England*. The particulars of the case are reported in 16 Sim. 83.

In the year 1624, *John Kendricke* bequeathed 7500*l.* to the Corporation of *Reading*, in trust to buy lands of the value of 50*l.* per annum; which sum, subject to a life interest therein, given to his sister, was to be distributed among the poor people of *Reading*. With another part of the 7500*l.*, the Corporation were to buy a suitable house in *Reading* for employing poor people (the poor of *Reading*

1848.
July 22nd,
28th, & 29th.

1849.
Nov. 14th.

Property was bequeathed to a Corporation upon certain trusts, for the benefit of the poor of the town, with a proviso, that if the Corporation failed for one year to apply the trust property in a proper manner, it should be transferred to the Corporation of L., for the benefit of Christ's Hospital. By

a decree on information, the application of the trust property was varied, but a similar provision was inserted in case of the misapplication of the trust property. A misapplication having taken place, it was held that the gift over was not repugnant to the original gift, nor void on the ground of perpetuity; that the forfeiture was still operative, and that the claim of the Plaintiffs (Christ's Hospital) was not barred by the lapse of more than twenty years from the time at which the misapplication of the trust property took place, and was known to them, and that they were entitled to call for a transfer of the property.

Observations upon the conduct of a Defendant who appeals without having taken any part in the discussion in the Court below.

1848.
 CHRIST'S HOS-
 PITAL
 v.
 GRAINGER.
 ———
Statement.

being preferred), and the residue of the 7500*l.* was to form a common stock, to be employed in the trade of clothing, and in working wool, hemp, flax, iron, grinding Brazil wood, and other stuffs for dyeing, or otherwise as to the Corporation should seem meet, for the employment of poor people, and for the preservation and increase of the said common stock. And he directed, that if the Corporation should neglect, omit, or fail to perform the premises according to his will, or should misemploy the said stock, and such neglect, omission, or misemployment should continue at any time by the space of one whole year together, then the legacy of 7500*l.* should be void as to the Corporation, and the common stock was to be paid to the Corporation of *London* for the benefit of Christ's Hospital in *London*, and the lands purchased out of the 7500*l.* were to be conveyed to the Corporation of *London*, to the use of the said hospital.

The Corporation of *Reading* purchased a house of the value of 50*l.* per annum, and lent the remainder of the 7500*l.* to clothiers of that town. This mode of dealing with the funds was, however, found to be injurious to the charity, and, in the year 1634, the Lords of the Privy Council interfered; and in consequence of their interference, an information was filed in the Court of Exchequer against the Corporations of *London* and *Reading*; and, by a decree made in 1639, the residue of the 7500*l.* was ordered to be laid out in land, and after providing for some repairs of the workhouse, and for accumulating a fund for the defence of the title, the income was to be employed in loans to poor beginners and clothiers, in binding children apprentices, in the marriage of poor maids, and in teaching poor and fatherless children handicraft trades in the town of *Reading*. In case the Corporation of *Reading* should neglect to perform these trusts, or misemploy the funds, and such neglect or misemployment should continue for

the space of one year, the trust property was then to be paid or conveyed to the corporation of *London* for the benefit of *Christ's Hospital*.

1848.
CHRIST'S HOS-
PITAL
v.
GRAINGER.
Statement.

The corporation of *Reading* invested portions of the 7500*l.* in the purchase of lands, and also invested part of it, as well as certain accumulations from the income, in the Three per Cents. The parties who had been appointed as trustees of the charity property under the Municipal Corporations Reform Act, had also invested some of the surplus income in the Three per Cents, and the amount of stock held by them in trust for this charity was now altogether about 7999*l.*

This bill was filed in November, 1842, by the corporation of *London* as governors of *Christ's Hospital*, against the trustees of the charity appointed under the Municipal Corporations Reform Act, the town-clerk of *Reading*, the corporation of *Reading*, and the *Attorney-General*. It alleged neglect and omission to apply the trust funds in a proper manner, for more than a year, and prayed for a declaration that the governors of *Christ's Hospital* were entitled to the charity estates and funds, and for a conveyance or payment of them to the corporation of *London*, as governors of the hospital.

An information had also been filed by the *Attorney-General*, to have a scheme for the administration of the charity, and for the *cy prés* application of the charity funds.

The *Vice-Chancellor* made a decree in accordance with the prayer of the bill; the *Attorney-General* had not argued any of the questions in the Court below, but he had now presented a petition of appeal from his Honor's decision.

1848.
 CHRIST'S HOSPITAL
 v.
 GRAINGER.
 Argument.

Mr. *Stuart*, Mr. *James Parker*, and Mr. *Freeling* appeared for the Plaintiffs ;

The *Solicitor-General*, Mr. *Twiss*, and Mr. *Blunt*, for the *Attorney-General*;

Mr. *Bethell*, Mr. *Bacon*, and Mr. *Selwyn*, for the trustees of the *Reading* charities.

The principal arguments which were urged, are noticed in the *Lord Chancellor's* judgment ; and, in addition to the authorities cited in the Court below, the following were referred to:—

The Attorney-General v. Boulton (a), *The Attorney-General v. The Earl of Mansfield* (b), *Bradley v. Peixoto* (c), *The Attorney-General v. Warren* (d), *Fazakerly v. Ford* (e), *The Earl of Scarborough v. Doe d. Savile* (f), *Taylor v. The Earl of Harewood* (g), *Nepean v. Doe* (h), *Brown v. Higgs* (i), *Richardson v. Chapman* (k), Co. Litt. 206. a., *Aislaby v. Rice* (l), *O'Connell v. M'Namara* (m), *The Attorney-General v. Bovill* (n).

In the course of the argument, it was urged that the claim of a *cestui que trust* would not be affected by lapse of time ; but

The LORD CHANCELLOR said—This is, as nearly as may be, the repetition of the error into which Sir *William Grant* fell,

- (a) 2 Ves. jun. 387.
- (b) 2 Russ. 514.
- (c) 3 Ves. 325.
- (d) 2 Swanst. 302.
- (e) 4 Sim. 390.
- (f) 3 A. & E. 897.
- (g) 3 Hare, 372.

- (h) 2 Smith's Leading Cases, 308.
- (i) 8 Ves. 561.
- (k) 7 Bro. P. C. 318.
- (l) 3 Madd. 256.
- (m) 3 Dru. & War. 411.
- (n) 1 Phill. 762.

in *Cholmondeley v. Clinton* (a). It is said, that, because there is no lapse of time between trustee and *cestui que trust*, therefore there can be no lapse of time between persons claiming adversely as beneficial objects of the charity. Here are two persons claiming adversely a beneficial interest in the trust. So, in *Cholmondeley v. Clinton*, Sir William Grant extended that rule of equity, and applied it to a case where it did not apply. As between parties claiming adversely the benefit of a trust, the time runs as much as if they were claiming a beneficial interest. Where the contest is between two *cestuis que trust* claiming adversely the benefit of a trust property, the lapse of time beyond all doubt is a bar.

1848.
 CHRIST'S HOS-
 PITAL
 v.
 GRAINGER.
 —
Argument.

The LORD CHANCELLOR:—

This was an appeal by the *Attorney-General*, who is a Defendant in the cause; and the first question to be considered is the position which he has assumed on this re-hearing. [His Lordship referred to the will of *Kendricke* and the decree of 1639.] That the directions in the decree of 1639, as well as those of the will have been neglected and unperformed for a period of far more than one year, is a fact clearly established and not in dispute on this re-hearing. Upon this fact the corporation of *London* by their bill sought to recover the property for the benefit of *Christ's Hospital*; and this the decree of the *Vice-Chancellor* directed.

1849.
 Nov. 14th.
 —
Judgment.

The *Attorney-General* was properly a party to this suit, but, as it appears, took no part in the discussion. To this there can be no objection, there being before the Court

(a) 2 Mer. 357.

1849.
 CHRIST'S HOS-
 PITAL
 v.
 GRAINGER.
 Judgment.

parties, the trustees for the town of *Reading*, interested in resisting the claim of the Plaintiffs; but that course could only be unobjectionable on the *Attorney-General* having considered that he might properly not only leave the discussion to the other Defendants, but abide by the decision upon it. I cannot approve of any party, after a decree which he did not oppose, re-opening the discussion by an appeal or re-hearing. As to such a party, the proceeding is, in effect, an original hearing. What might be the result of such an attempt by an ordinary party, I need not now decide, because in cases of charities the Court is less strict in enforcing its rules of proceeding, and will not on such an objection refuse to hear such case as the *Attorney-General* may have to make.

The only case which the *Attorney-General* can make, or which he has attempted to show, is, that the bill ought to have been dismissed: that is, that, so far as the cause is concerned, the Court ought to have decided that, although the directions of the will and of the decree of the Court of Exchequer have been wholly neglected, and the charity property, therefore, misapplied, the town of *Reading* is nevertheless to continue in the enjoyment of the property. Such, in point of form, must be the contest of the *Attorney-General*; but such is not and cannot be his real object. But he, finding that the decree shuts out the case which he had thought it right to present to the Court on an information, takes this step to remove the impediment out of his way. This again shews how unfortunate it was that he did not raise the whole case in the Court below, which might and ought to have been done by the cause and the information being heard together. The Court is well justified in regretting, and probably in complaining, that this was not done; but I do not think it right, upon these grounds, to decline giving my opinion on the points raised now for the first time by the *Attorney-General*.

I proceed, therefore, to consider them, bearing in mind that this is a gift to a corporation on certain charitable trusts, with a proviso, that in a certain event such gift shall cease, and the property be transferred to another corporation for certain other charitable trusts; and that the event, upon which such cesser and transfer were directed to take place, has happened. *Brown v. Higgs*(a) was cited as proving that the gift over could not take effect from the act of the trustees. That case not only does not support that proposition, but proceeds on a principle inconsistent with it; for it only on this point decided, that the object of a testator should not be disappointed by the neglect of a trustee. But in this case the testator has made the gift over to depend upon the act of the trustee. And to hold that the act of the trustee was inoperative for the transfer, would be to depart from and not to perform his object. The *Attorney-General* also contends, that this provision for cesser and transfer was void, as repugnant to the original gift. This is so, if the original gift was indefeasible, but not otherwise; and that is the question. That proposition, therefore, is only a consequence of the point in dispute, if decided one way, and not an argument for that decision.

It was then argued, that it was void as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of this property from one charity to another? If the corporation of *Reading* might hold the property for certain charities in *Reading*, why may not the corporation of *London* hold it for the charity of *Christ's Hospital* in *London*? The property is neither more nor less alienable on that account.

(a) 8 Ves. 574.

1849.
CHRIST'S HOS-
PITAL
v.
GRAINGER.
Judgment.

1849.
CHRIST'S HOSPITAL
v.
GRAINGER.

Judgment.

The next argument was, that the forfeiture created by the will was destroyed by the decree, and that the forfeiture created by the decree was inoperative, being beyond the jurisdiction of the Court. These arguments are very little consistent. If the Court exceeded its jurisdiction in the provisions for the transfer, the provisions of the will were not affected by it. But, in fact, the decree only varied the first trusts prescribed by the will, substituting others, but preserved the forfeiture; and whether the forfeiture under the will or under the decree be the operative power, is not material, it being established that the event has happened, which, under either, was to create the cesser and transfer. To this answer it was contended, that the bill sought relief only under the provisions of the will; but that is not so; for the bill alleges "that the Plaintiffs are advised, that, under the circumstances before stated, the limitation over in favour of the Plaintiffs contained in the will has taken effect, and that the Plaintiffs are now entitled, under the provisions of the will and of the decree, to have the property transferred to them."

But, lastly, it was contended, that the Plaintiffs' claim was barred by time, more than twenty years having elapsed since the facts which were stated to have created the forfeiture, and since the Plaintiffs knew of those facts. Time is permitted to create a bar, in order to quiet titles. Is, then, the *Attorney-General* contending that time has sanctioned the breaches of trust committed by the corporation of *Reading*, and that the purposes to which they applied the trust property are not to be disturbed? This cannot be, and is not the object of the *Attorney-General*. His object is to let in the jurisdiction of the Court, in order to have the property applied to purposes distinct from the will or the decree. He repudiates the purposes for which the corporation of *Reading* were directed to apply the property, as much as he does those to which the corporation

of *London* were directed to apply it. Is this quieting the title of the corporation or of those who now claim in their place? The question is not, whether time be a bar to any claim adverse to the title of the original donee, but whether such title is to be superseded in favour of those to whom, upon failure of such title, the testator has given the property, or in favour of general charity unconnected with any expressed object of the testator. If, indeed, there were adverse claims between *cestuis que trust*, time might create a bar as between them, though it could not as between the *cestuis que trust* and the trustee, on the principle ultimately established in *Cholmondeley v. Clinton* (a). But that is not the case here. Both the contending parties, the *Attorney-General* and the Plaintiffs, under the same facts, claim the property which, up to the present time, has remained in the hands of the forfeiting party, who no longer disputes the forfeiture. As between the *Attorney-General* and the Plaintiffs, there has not been any adverse title or possession. Some confusion may have arisen from the use of the word "forfeiture." In one case the cesser of one set of trusts and the commencement of the other may be considered as a forfeiture; but the form and substance of the provision is rather a substitution of one trust for another. The property was vested in the corporation of *Reading*, but in a certain event they were to become trustees of it for *Christ's Hospital*: as to the 50*l.* per annum, they were directed to pay it to the treasurer of *Christ's Hospital*; and as to the *corpus* of the property, their first trust having ceased, the corporation of *Reading* were directed to pay it to the corporation of *London* for the benefit of *Christ's Hospital*, as before directed with respect to the 50*l.* per annum, and they were directed to convey and transfer the same accordingly. Now, if the effect of these provisions was to constitute the corporation of *Reading*, in

1849.
 CHRIST'S HOS-
 PITAL
 v.
 GRAINGER.
 Judgment.

(a) 2 J. & W. 1; 4 Bligh, 1.

1849.
 CHRIST'S HOS-
 PITAL
 v.
 GRAINGER.
 ———
Judgment.

the event which happened, trustees for *Christ's Hospital*, until they transferred the property as directed, (and such it would seem was the only interest they had, and only duty they had to perform), there would not have arisen, as between them and the Plaintiffs, any question of time or adverse possession. But that is not the question I have to consider.

It appears to me, that the *Attorney-General* cannot maintain the points he has attempted to establish upon this re-hearing, and that the decree of the *Vice-Chancellor* must be affirmed.

1848.
 Nov. 15th &
 16th.
 1849.
 Nov. 20th.

MANGLES v. DIXON.

By a charter-party, certain monthly payments were agreed to be made by the charterers to the ship-owners on account of freight, and the remainder was to be paid

THIS was an appeal from a decision of the Vice-Chancellor *Knight Bruce*.

By a charter-party dated the 23rd of April, 1845, and made between Messrs. *Boyd & Co.*, who were therein described as "owners of the good ship or vessel called the *Fifeshire*," and the Plaintiffs, Messrs. *Mangles & Co.*, the

when the ship returned. But the real agreement between the parties was, that the adventure should be at their joint risk. The charter-party was allowed to remain in the hands of the owners, who deposited it with their bankers as a security for monies lent by them. The bankers gave notice of the deposit to the charterers, and claimed and received from them several monthly payments on account of freight. The owners became bankrupt, and on the return of the ship the adventure proved to be a losing one; and the charterers then first informed the bankers of their agreement with the owners that the speculation should be at their joint risk:—*Held*, that, although the equity of the charterers was originally prior to that of the bankers, their conduct had precluded them from insisting upon it; and that they were not entitled to an injunction to restrain the bankers from proceeding with an action to recover the whole of the remainder of the freight.

Seemle, where a party who has a prior equitable lien upon a fund, receives notice of a second incumbrance made without any previous communication with or inquiry from him, but conceals his prior equity and makes payments to the second incumbrancer inconsistent with it, he will be postponed.

Plaintiffs agreed to hire the ship for a time not exceeding eighteen months, and to pay freight for her to Messrs. *Boyd & Co.*, by certain instalments; and by virtue of that arrangement, a sum of 150*l.* cash was to be paid to *Boyd & Co.*, at the expiration of eight months from the time of the ship's sailing, and a further sum of 150*l.* at the expiration of every succeeding month while the ship was employed, and the remainder on the delivery of the cargo.

1848.
 MANGLES
 v.
 DIXON.
 —
Statement.

By a memorandum of agreement dated the 24th of April, 1845, the Plaintiffs agreed with *George Joseph Ashton* that the speculation should be carried on at their joint account and risk, in equal proportions. And by another document of the same date, Messrs. *Boyd & Co.* guaranteed the Plaintiffs in respect of the share which Mr. *Ashton* was bound to pay.

Ashton was a clerk of Messrs. *Boyd & Co.*; and the real agreement between the parties was, that the Plaintiffs and Messrs. *Boyd & Co.* were to carry on the speculation on their joint account, and share equally in the profit or loss.

In May, 1845, Messrs. *Boyd & Co.* received from Messrs. *Dixon & Co.* a loan of 12,000*l.*, and as a security for that sum they afterwards deposited with *Dixon & Co.* the charter-party, with the following memorandum written upon it:—

“December 1, 1845.

“Messrs. *Mangles, Price, & Co.*,

“Please pay the amount of what is due, from this date, to Messrs. *Dixon & Co.*, or their order.

JOHN BOYD & Co.”

No inquiry respecting the charter-party was made by

1848.
 MANGLES
 v.
 DIXON.
 —
Statement.

Dixon & Co. from the Plaintiffs, before they made the advance to *Boyd & Co.*; but on the 14th of March, 1846, *Dixon & Co.* sent to the Plaintiffs a formal notice of the deposit, and required the Plaintiffs to pay to them all monies then due, or which might thereafter become due, under the charter-party.

On the 16th of May, 1846, *Dixon & Co.* claimed from the Plaintiffs 150*l.*, which had become due for freight on the 1st of that month. Some verbal communications took place between the parties or their solicitors, from which it appeared that the Plaintiffs were aware that *Boyd & Co.* were then in a state of insolvency; and on the 20th of May the Plaintiffs wrote to *Dixon & Co.* the following note :—

“ May 20, 1846.

“ We have now the pleasure to enclose you Bank-notes for 150*l.*, being the amount due on account of charter-party by the ship *Fifeshire*, made over to you by Messrs *John Boyd & Co.*, for which be good enough to send us a stamped receipt.

“ MANGLES & Co.”

In July, 1846, the Plaintiffs paid to *Dixon & Co.* a further sum of 300*l.*, in respect of the two following monthly payments of 150*l.* each, on account of the freight. In May, 1846, *Boyd & Co.* became bankrupt; and in the following month of August the ship returned, and it was then discovered that the speculation would subject all the parties who had engaged in it to an ultimate loss. The Plaintiffs insisted that *Boyd & Co.*, if they had not become bankrupt, would have been entitled to receive 1379*l.* 4*s.* only, which the Plaintiffs were willing to pay to *Dixon & Co.*, who, on the other hand, claimed a sum of 3717*l.* 14*s.* 8*d.*, as the balance due for the hire of the ship, according to the terms of the charter-party; and they commenced an

action in the Court of Exchequer against the Plaintiffs in this suit for that sum.

The Plaintiffs then filed their bill against *Dixon & Co.*, and *Boyd & Co.*, and their assignees, and it prayed that accounts might be taken of the joint adventure, including the freight of the *Fifeshire*, and that the balance might be ascertained, and for a declaration that *Dixon & Co.* were only entitled to stand in the place of *Boyd & Co.*, upon the footing of the agreement between them and the Plaintiffs, and for an injunction to restrain *Dixon & Co.* from proceeding with their action.

The bill charged, that, according to the usual practice and custom between the owners of ships and the charterers, the amount of the instalment was not more than one-half the sum which would have been paid if the parties had not been jointly interested in the adventure.

The cause came on to be heard before the Vice-Chancellor *Knight Bruce*, in June, 1848, when his Honor ordered that the Plaintiffs should pay to *Dixon & Co.* the sum of 1379*l.* 4*s.*, on or before the 28th of July then next, without prejudice to any question in the cause, and they were to have credit for that sum in the accounts to be taken; and he also restrained *Dixon & Co.* from issuing execution on the judgment obtained by them in the action; and it was referred to the Master to take an account of the freight, and of all transactions between the Plaintiffs and *Boyd & Co.*, and their assignees, upon the footing of the charter-party and the agreement with *Ashton*; and the Master was to ascertain the balance.

Messrs. *Dixon & Co.* appealed from that decision.

1848.

MANGLES

v.

DIXON.

Statement.

1848.

MANGLES

v.

DIXON.

Argument.

Mr. *Cooper* and Mr. *Lovat*, in support of the appeal.

The Plaintiffs, by allowing *Boyd & Co.* to retain the charter-party, enabled them to represent themselves as entitled to the whole freight; and their conduct, in making no claim adverse to the lien of *Dixon & Co.* until the bankruptcy of *Boyd & Co.*, and in paying three monthly instalments to *Dixon & Co.* on account of the freight, prevents them from sustaining any equity as against them. In *Troughton v. Gitley* (a), Lord *Hardwicke* says, "If a man having a lien stands by and lets another make a new security, he shall be postponed."

Mr. *Humphry* and Mr. *J. Smith*, in support of the decree.

Messrs. *Dixon & Co.* advanced the money to *Boyd & Co.* without any previous communication with the Plaintiffs, and took a deposit of the charter-party. The transaction was then complete, and *Dixon & Co.* acquired such a lien as *Boyd & Co.* could give them, which was, of course, subject to the prior equity of the Plaintiffs. The Plaintiffs knew nothing of the transaction for some months; and there is no authority for postponing their claim for the benefit of *Dixon & Co.*

[The LORD CHANCELLOR.—Messrs. *Mangles* had nothing whatever to do with the deposit; and any equity which Messrs. *Mangles* may have had as against the Messrs. *Boyd* upon that charter-party, would not have been affected by any claim which Messrs. *Boyd* might have created as between themselves and Messrs. *Dixon*; because that would be within the common and ordinary rule, which it requires no proof or authority to establish—that as between equities the prior equity takes precedence; but that doctrine has nothing to do with the present question; it is not in dispute at all. The transaction, as taken up at that period, beyond all

(a) 2 Amb. 633.

1848.
 MANGLES
 v.
 DIXON.
 —
Argument.

would give Messrs. *Mangles* any equity they might
 ad against the freight so to be paid by themselves.
 t equity, however, Messrs. *Dixon* had no notice; but
 ing had taken place to deprive Messrs. *Mangles* of
 prior equity, their prior equity must prevail against
 nity I find to be created by Messrs. *Boyd* in favour
 srs. *Dixon*.]

question is, whether, after Messrs. *Mangles* acquired
 vledge of the mode in which Messrs. *Boyd* had dealt
 his freight, given by them as security to Messrs.

and after the evil has arisen from the bankruptcy
 srs. *Boyd*, they can now step in and say to Messrs.

“You shall not hold this security for the amount
 lessrs. *Boyd* pledged it to you for; you shall have
 ne-half of it: our equity prevails over yours, because
 a prior date, and nothing has taken place to deprive
 he right of that prior equity.” That is the position
 ch the case stands in point of fact; and the only
 on which remains to be considered is, whether upon
 acts Messrs. *Mangles* can claim under, or, as against
 a *Dixon*, are precluded from, that equity, which un-
 edly they had prior to March, 1846.

ould be very sorry, and a good deal surprised, to find
 e concealment of the prior equity not having taken
 at the time of the equity being created in Messrs.
 , should make any difference. Beyond all doubt, if
 positing of that security with Messrs. *Dixon* had taken
 when Messrs. *Mangles* were present, and they had
 ards told them that Messrs. *Boyd* were doing that
 they had no power to do, they then could offer no
 against Messrs. *Dixon*’s title. I should require no
 rity to shew that that is the rule of this Court.

at I wish Mr. *Cooper* to address himself to, if he has

1848.
 MANGLES
 v.
 DIXON.
 —
 Argument.

the means of doing it, is to shew me some authority in which the rule of equity has been applied to a case where a party has concealed his equity, after an equity has been created in another party. I do not say that if no such case were to be found, I shall have any difficulty in dealing with such a case; but if it has been the subject of decision, I should like to see what has been done before.]

Nov. 16th. The following authorities were mentioned on behalf of the Appellants:—

Hunsden v. Cheyney(a), *Mocatta v. Murgatroyd*(b), *Hobbs v. Norton*(c), *Savage v. Foster*(d), *Hanning v. Ferrers*(e), *The East India Company v. Vincent*(f), Fonb. Treat. Eq., book 1, ch. 3, s. 4.

The following authorities were also mentioned on the other side:—Story's Eq. Jur. ss. 418, 419, 420, *Evans v. Bicknell*(g), *Ibbottson v. Rhodes*(h), *Moore v. Jervis*(i).

1849.
 Nov. 20th.
 —
 Judgment.

The LORD CHANCELLOR (after stating the facts of the case):

Upon this state of facts, there could be no doubt of the title in Messrs. *Dixon & Co.* to receive the whole freight, after the notice of the 14th of March, 1846. By the deposit and indorsement, there was an equitable assignment of the debt, with notice to the debtors. But the case is met, and has been decided against Messrs. *Dixon & Co.*,

(a) 2 Vern. 151; 13 Vin. Abr.
 536.
 (b) 1 P. Wms. 394.
 (c) 1 Vern. 136.
 (d) 9 Mod. 36.

(e) 1 Eq. Cas. Ab. 357.
 (f) 2 Atk. 83.
 (g) 6 Ves. 191.
 (h) 2 Vern. 554.
 (i) 2 Coll. 60.

upon a transaction between Messrs. *Boyd & Co.* and Messrs. *Mangles & Co.*, of which Messrs. *Dixon & Co.* had no notice. It appears that it was agreed between Messrs. *Boyd & Co.* and Messrs. *Mangles & Co.*, that the adventure should be a joint adventure as between those two houses; and it was contended that Messrs. *Mangles & Co.* are therefore liable only for one-half of the freight made payable by the charter-party. This arrangement was intended to be secret: it was for that purpose made in the first instance between Messrs. *Mangles & Co.* and Mr. *Ashton*, the clerk of Messrs. *Boyd & Co.*, who, by a separate instrument, made themselves responsible for the acts of *Ashton*. And it is to be observed, that although the adventure was clearly to be conducted by Messrs. *Mangles & Co.*, yet there was no proof made, and no inquiry directed, as to whether the deposit of the charter-party to secure the 12,000*l.*, and the borrowing of that sum, was not for the purpose of the joint adventure; which, if such was the fact, particularly after the knowledge and acquiescence of Messrs. *Mangles & Co.*, would form a very important consideration in deciding upon the right of Messrs. *Mangles & Co.* to dispute the title of Messrs. *Dixon & Co.* But there is, I think, sufficient to come to a very safe conclusion upon the equities of the case, without taking that point into consideration.

1849.
 MANGLES
 v.
 DIXON.
 —
Judgment.

Assuming, therefore, for the present view of the case, that Messrs. *Boyd & Co.* did not borrow or apply the 12,000*l.* for the purpose of the joint adventure, and that they had no right to pledge the freight for securing the repayment of that sum, we have the case of Messrs. *Mangles & Co.* having the secret right to receive one-half of the freight, but representing by that charter-party that they were liable to pay the whole, and that Messrs. *Boyd & Co.* were entitled to receive the whole of it. They therefore put into the hands of Messrs. *Boyd & Co.* the means of imposing upon

1849.
MANGLES
v.
DIXON.

Judgment.

others, not merely by concealing their own right, but by declaring that they had no such right, and that the whole belonged to Messrs. *Boyd & Co.*

It is a well-known rule, that the party having a secret equity, who stands by and permits the apparent owner to deal with others as if he was the absolute owner, and as if there was no such equity, should not be permitted to assert such secret equity against a title founded upon such apparent ownership. Many decisions have been founded on this principle. But this case does not rest upon that: for not only was the secret equity suppressed, but the party claiming it has armed the apparent owner with proof, resting upon his own declaration, that no such equity existed; and therefore cannot afterwards dispute an act founded upon such apparent ownership, as against the party claiming under it.

The last case in the House of Lords, of *The Duke of Beaufort v. Neeld* (a), makes it unnecessary to refer to other authorities. The Duke signed and put into the hands of his agent an authority to consent to any exchange under an inclosure act, but directed his agent privately not to act upon such authority unless under certain circumstances. The agent produced the authority, and agreed to an exchange not under the stipulated circumstances; upon which ground the Duke disputed the agreement so entered into: but the House of Lords held the Duke bound. This case, however, does not rest here: for whatever knowledge Messrs. *Mangles & Co.* may have had of the transaction before the 14th of March, 1846, they had on that day regular notice of the deposit and assignment, by which they were informed formally, and probably not for the first time, that Messrs. *Boyd & Co.* had assigned the whole of the

(a) 12 C. & F. 249.

future freight to Messrs. *Dixon & Co.*, but they made no assertion of their supposed equity, or raised any question as to the right of Messrs. *Boyd & Co.* so to dispose of the freight. On the contrary, they paid the amount due, and in their letter recognised the fact that the charter-party had been made over to Messrs. *Dixon & Co.* by Messrs. *Boyd & Co.*, and, so late as July, 1846, paid to them the two instalments which had become due on the 1st of June and the 1st of July. These payments were also made after the insolvency of *Boyd & Co.*, and the two last after a fiat had been issued against them, which was on the 25th of May. It was therefore at that time the interest of *Mangles & Co.*, if they had any ground for disputing the title of *Dixon & Co.*, under the deposit and assignment of *Boyd & Co.*, to have resisted those demands. But it does not appear that they did so until the return of the ship in August, 1846, when it was ascertained that the adventure would be a loss. This conduct of *Mangles & Co.* is, in my opinion, conclusive between them and *Dixon & Co.* If the act of *Boyd & Co.* required confirmation, it was sufficient to confirm it. But it is perhaps of more importance, as proving they had no equity as against that act, and as of itself creating a bar to any such right, which they might have had, by permitting *Dixon & Co.* to continue in the supposition that the security of *Boyd & Co.* was sufficient. It is impossible to know now how far they might have improved their position, if the claim of *Mangles & Co.* had been asserted in March, 1846, or the following month of May, when the 150*l.* was paid, although their attention was then called to the fact of the insolvency of *Boyd & Co.*

1849.
 MANGLES
 v.
 DIXON.
 Judgment.

Upon all these grounds, I am of opinion that *Dixon & Co.* are entitled to the full benefit of all the freight reserved by the charter-party, which became due after the notice of March, 1846; and, as they were made parties to the suit solely upon the ground that they were not so entitled, the

1849.

MANGLES

v.

DIXON.

Judgment.

bill as against them ought to have been, and must now be, dismissed with costs.

It is, however, I hope, probable that the action will not proceed, and that the amount of freight due will be settled between the parties.

Nov. 26th.

HYDE v. EDWARDS.

Where, upon petition, a reference is ordered to the Master to inquire what parties are entitled to a fund in Court arising from the purchase-money paid by a Company in respect of land taken by them, the order should contain the same directions for the production of documents and the examination of the parties as if it had been made by decree in a suit.

THE object of this suit was, to ascertain who were the persons entitled to a fund which had been paid into court by the *London Dock Company*, as part of the purchase money for some land which had been taken by that Company under the powers of their Act, and in which *Anna Maria Betts* was interested to the extent of one moiety. The Defendant had presented a petition, which was heard in July, 1841, when the *Master of the Rolls* ordered a reference to the Master to inquire who were the heirs-at-law of *Anna Maria Betts*, and who was the heir *ex parte maternâ* of her father, *James Prince*. That petition did not contain any direction for the production of deeds and papers, or the examination of the parties: and upon the question being afterwards brought to the attention of the *Master of the Rolls*, upon another petition, his Lordship stated, that he was informed by the Registrar that it was not the practice of the Court to insert such directions in orders of this description made on petition (a).

This suit was afterward instituted, and the Defendant obtained an order from the *Master of the Rolls* to stay further proceedings in it, until the Master should have made his report, under the reference ordered on the petition,

(a) *In re The London Dock Company*, 11 Beav. 78.

the object of that petition and of this suit being of the same kind: and the question now came before the *Lord Chancellor* upon a motion on behalf of the Plaintiffs to discharge that order of the *Master of the Rolls*.

1849.
 HYDE
 v.
 EDWARDS.
 ———
Statement.

The LORD CHANCELLOR concurred with the *Master of the Rolls*, as to the propriety of the order to stay proceedings in the suit; but he observed, that if the Plaintiffs had any ground to complain, it related rather to the order made on the first petition, than to the order which they now sought to discharge. His Lordship thought, that where the Court, under the powers given by such an Act as that by which the *London Dock Company* were incorporated, made an order of reference to the Master to inquire who were the parties to whom a fund in court ought to be paid, it was proper that the Master should be armed with all the powers which the Court was in the practice of giving to him upon a reference under a decree. It was equally necessary that the Court should have the fullest and most satisfactory inquiry, before it ordered the fund to be paid out of court. There was the same duty to perform, whether the reference was ordered in a suit or on a petition; and therefore the usual directions which were to be found in a decree, ought to be inserted in an order made on petition in such a case as the present. His Lordship, therefore, under these circumstances, refused to make any alteration in the order appealed from; but, with the consent of all the parties, he ordered the usual direction to be inserted in the order of July, 1841, for the production of books and papers, and for the examination of the parties.

Judgment.

Mr. *Roundell Palmer*, Mr. *Bacon*, Mr. *Elderton*, and Mr. *Stevens*, appeared for the different parties.

1849.

Nov. 6th.

COHEN v. WILKINSON.

Where an Act of Parliament has been obtained by a Company for constructing a line of railway, and funds have been subscribed for that purpose, this Court will, on the application of a single shareholder, restrain the Company from applying those funds, or any part thereof, in the construction of a railway on a portion only of the line, or otherwise than for the purpose and with the view of making and completing the entire line.

—
Statement.

THE bill, which was filed on the 1st of June, 1849, by *Abraham Cohen*, on behalf of himself and all other the proprietors of shares in the *Direct London and Portsmouth Railway Company*, except the Defendants, against *William Arthur Wilkinson*, the chairman of the Company, and the other directors, and against the Company itself, prayed (*inter alia*) a declaration that it was not within the powers of the Company to make a railway from *Epsom* to *Leatherhead* only, and that the funds of the Company could not lawfully be applied for that purpose, and that the Defendant *William A. Wilkinson*, and his Co-defendants (naming them), the other directors, might be restrained by the injunction of the Court, from making the proposed railway from *Epsom* to *Leatherhead* only, and also from applying any of the funds of the Company for that purpose; and that the *Direct London and Portsmouth Railway Company* might, in like manner, be restrained from sanctioning any arrangement relative to the tolls mentioned in an advertisement of the 18th of May last past. The bill, which was supported by the affidavits filed on a motion for an injunction in conformity with the prayer of the bill, stated that an Act of Parliament (9 & 10 Vict. c. lxxxiii) was passed for making a railway from, and in connexion with, the Croydon and Epsom Railway, commencing from a junction therewith in the parish of *Epsom*, to the parish of *Portsea*, in or near the town of *Portsmouth*, to be called "*The Direct London and Portsmouth Railway*;" that it contained powers for raising a capital in shares, and for taking the lands required for making the railway, but no period was prescribed therein for the exercise of the Company's powers for the compulsory purchase or taking of lands for the purposes of their Act; that, by the 123rd sect. of the Lands Clauses

Consolidation Act (8 Vict. c. 18), which, together with the Companies Clauses Consolidation Act (8 Vict. c. 20), were incorporated in the special Act of the *Direct London and Portsmouth Railway Company*, it was enacted, that the compulsory powers for taking lands given by the special Act should not be exercised after the period prescribed therein; and, if no period were prescribed, not after the expiration of three years from the passing of the special Act; that the royal assent was given to the special Act on the 26th of June, 1846, and consequently the powers for the compulsory taking of lands expired on the 26th of June, 1849; that by the special Act it was also provided, that the railway should be completed within five years from the passing of the Act; and on the expiration of such period, the powers by the special or incorporated Acts granted to the Company for executing the railway, or otherwise in relation thereto, should cease to be exercised, except as to so much of the railway as should then be completed; that the Plaintiff was an original subscriber to the undertaking, and was then the proprietor of seventy-one shares, and had paid the deposits and all the calls which had been made thereon; that numerous other persons, amounting to more than 500, had also subscribed; and that large sums had been paid by them for deposits and calls; that the capital of the Company was to consist of 1,500,000*l.* in 30,000 shares of 50*l.* each; that the sum of 128,467*l.* 15*s.* had been raised by the directors; and that, after the payment of preliminary and parliamentary expenses, there remained in their hands a balance of 27,585*l.* 2*s.* 1*d.* only, as appeared from their report of the 26th of February, 1849; that no part of the line of railway authorised by the Act had been made or commenced by the directors; that, at the ordinary half-yearly meeting of the proprietors of the Company, held in August, 1848, the directors made a report, in which the following passage occurred:—"The directors have to regret the loss of the

1849.
COHEN
v.
WILKINSON.
Statement.

1849.
COHEN
v.
WILKINSON.
—
Statement.

bill to enable the London, Brighton, and South Coast Railway Company to hold shares in this undertaking, in accordance with the arrangement which had received the sanction of the proprietors of both Companies. The directors, however, hope that they may be still able to effect some arrangement under existing powers, which will enable this Company to commence the construction of the first portion of the line—namely, that between *Epsom* and *Dorking*—upon terms which will afford the proprietors a remuneration, not only for any further amount which may be required, but also for the capital which they have already expended;” that at the same meeting the chairman, *William A. Wilkinson*, after stating that there was no great likelihood of proceeding with the affairs of the Company, suggested two courses for their adoption—either to allow their powers to lapse, or to obtain an Act for dissolving the Company; but as the only two applications of the latter kind made to Parliament had failed, he was of opinion that it would not damage the shareholders to remain as they were, and allow the directors to arrange with the Brighton Company (the then owners of the *Epsom* and *Croydon* line), for constructing a portion of the line between *Epsom* and *Dorking*; that, at the next half-yearly meeting, on the 27th of February, 1849, the directors submitted a report to the proprietors, a portion of which was as follows:—“Since the last meeting of the proprietors, the attention of the directors has been constantly applied to the subject of the arrangement contemplated in the leading paragraph of their report made to that meeting, whereby the funds expended on this undertaking might be rendered effectual, to some extent, for the purposes for which they were advanced; but they regret that they are still unable to announce anything definite;” that the chairman, at the said meeting, after alluding to the failure of the proposed arrangement with the Brighton Railway Company, in reference to the *Epsom* and *Dorking* section of the line,

which the directors intended to construct, observed, "We are now in the third year of our existence, and, after having struggled through two Sessions to obtain our Act, we fell upon evil times; and as the powers of our Act expire next June, there is no human probability that we can carry out the intentions of our Act;" that it appeared, by the proceedings at the said meetings, and the fact was, that the Company and the directors thereof had long since abandoned all intention to construct a railway, pursuant to their Act, from the Croydon and Epsom Railway to the parish of *Portsea*, a distance of about fifty-six miles, but that the said directors had had under their consideration a plan for making a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of *Epsom*, and terminating at or near *Leatherhead*, in the county of *Surrey*, the same being a distance of about four miles only; that the Plaintiff was advised, that the Company and the directors thereof were not authorised by their Act to make such last-mentioned railway from *Epsom* to *Leatherhead* only; and that, to make the same and to apply the monies of the Company to that purpose, instead of making the whole railway from *Epsom* to *Portsmouth*, would be illegal; and that such illegality affected in common the interests of the Plaintiff and all other the proprietors of shares in the Company; that the Defendants, as such directors as aforesaid, had, since the last-mentioned general meeting, revived the plan of making a railway from *Epsom* to *Leatherhead* only; and that they then intended to apply the monies of the Company to that purpose; and that they had, moreover, entered into an arrangement with the London, Brighton, and South Coast Railway Company, for the working by the last-mentioned Company of such railway, when made, on payment of certain tolls; that, on the 18th day of May last, the directors of the Company caused to be inserted in the *Times* newspaper, the following advertisement, signed by

1849.

COHEN

v.

WILKINSON.

Statement.

1849.
COHEN
v.
WILKINSON.
—
Statement.

the chairman and secretary of the said Company, that is to say—" *Direct London and Portsmouth Railway*—Notice is hereby given, that an extraordinary general meeting of the shareholders of this Company will be held on Tuesday, the 12th day of June next ensuing, at the London Tavern, Bishopsgate-street, within the City of *London*, at one o'clock precisely, for the purpose of sanctioning a toll arrangement entered into by the directors of this Company with the London, Brighton, and South Coast Railway Company, for the working of the portion of the line between *Epsom* and *Leatherhead*, when constructed;" and that the directors intended, on behalf of the Company, forthwith to take and purchase such lands, situate between *Epsom* and *Leatherhead*, as were required for forming the said proposed railway from *Epsom* to *Leatherhead*, and to enter, on behalf of the Company, into agreements for the purchase thereof with the owners of such lands, and to take other proceedings for effecting such purchases; and the directors also intended, on behalf of the Company, forthwith to enter into and sign contracts and agreements for the purpose of completing the said proposed railway.

The Defendant *William A. Wilkinson*, and *John Parsons*, one of the solicitors of the *Direct London and Portsmouth Railway Company*, in their affidavits in opposition to the motion for the injunction, stated, (*inter alia*), that, previously to the passing of the *Direct London and Portsmouth Railway Act*, contracts had been entered into by the promoters of the undertaking, with the landowners between *Epsom* and *Portsmouth*, for the purchase of land; and that, in the year 1847, the directors proceeded to take measures for making the line from *Epsom* to *Portsmouth*; that they served notices upon the landowners on the line of their intention to take their lands; that they entered into contracts with others for the purchase of their lands, and paid divers sums of money for holding over such contracts

until the lands should be required; that, further powers being requisite to authorise the making of deviations and alterations in the line, they abstained from serving notices on parties who would be thereby affected; that, by an Act (10 & 11 Vict. c. clxvii) a deviation in the approach of the intended line to *Dorking* (which was to be completed in two years), and other alterations were sanctioned, with compulsory powers during a period of three years to take lands: that the Reading, Guildford, and Reigate Railway Company's Act was obtained in 1846, which gave that Company power to construct that portion of the line between *Gomshall* and *Dorking*, if the *Direct London and Portsmouth Railway Company* should not have completed the whole line between *Epsom* and *Havant* within the specified time; but power was therein reserved for the *Direct London and Portsmouth Railway Company* to require a transfer of the line after completion, on payment of the expenditure previously made: that, in the early part of the year 1849, notices were served on the owners of land between *Epsom* and *Leatherhead*, and in many instances the lands were actually purchased and paid for, and possession given to the Company, and in a majority of cases contracts were entered into between the Company and the owners for the purchase of their lands at prices specified, and that, in all cases where the prices of such lands had not been agreed upon, the question of amount was left to the arbitration of parties agreed upon in writing, and were either executed or ready to be executed: that large purchases had been made between *Gomshall* and *Havant*, and that the Railway Commissioners had refused to extend the time for making the line: that arrangements had been made with the Brighton and Chichester Railway Company, incorporated by an Act 7 & 8 Vict. c. lxvii, by which they were to make that portion of the line between *Havant* and *Portsmouth*; and the *Direct London and Portsmouth Railway Company* were to have the use of it: that in

1849.

COHEN
v.
WILKINSON.
—
Statement.

1849.
 COHEN
 v.
 WILKINSON.
 —
Statement.

June, 1848, the *Direct London and Portsmouth Railway Company* gave notice to the Reading, Guildford, and Reigate Railway Company, that they intended to abandon the line between *Gomshall* and *Dorking*; and that the Reading, Guildford, and Reigate Company had since constructed it: that it was still practicable to take lands for the whole line; that the distance between *Gomshall* and *Dorking* was four miles, and between *Portsmouth* and *Havant* was six miles; that neither the *Direct London and Portsmouth Railway Company*, nor the directors, had ever determined not to make the railway from *Epsom* to *Portsmouth*, but that it had been impossible to proceed further than already appeared in making the railway, from the difficulties of the times and other financial considerations: that the construction of the railway, to the extent proposed, would be beneficial to the shareholders of the Company, and was desired by the inhabitants of *Leatherhead*, and the neighbourhood thereof; and that it was probable that the whole of the *Direct London and Portsmouth Railway Company*, or some railway in the same line, would, at some future period, be constructed.

The *Master of the Rolls*, on the conclusion of the arguments before him, on the application to his Lordship for an injunction, on the 12th of June, 1849, granted the same, and expressed his opinion, that, without the authority of another Act of Parliament, the directors had no power to apply the capital subscribed for the whole line to the completion of a part only of that line. By the terms of the injunction, as issued, the Defendants were “restrained from applying the capital and funds of the *Direct London and Portsmouth Railway Company*, or any part thereof, in or towards the construction of a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of *Epsom to Leatherhead*, in the county of *Surrey*, only, or any otherwise than for the purpose and with the

view of making and completing the said railway from the said Croydon and Epsom Railway, as aforesaid, to the parish of *Portsea*, in or near the town of *Portsmouth*, in the county of *Southampton*, pursuant to the powers now vested, or hereafter to be vested, in them by Parliament."

1849.
 COHEN
 v.
 WILKINSON.
 Statement.

A motion was now made on behalf of the Defendants, to dissolve the injunction granted by the *Master of the Rolls*.

Mr. *Malins* and Mr. *Bovill*, in support of the motion.

Argument.

If the decision of the Court below is to stand, a Railway Company cannot lawfully construct 99 of the 100 miles, the whole length of the line. The directors are not exceeding the powers given to the Company, and have entered into binding contracts for the purchase of lands lying along that portion of the intended line, situate between *Epsom* and *Leatherhead*; and beyond *Leatherhead* the directors could not proceed without further authority from the Legislature; and no dissentient voice was raised at the meetings of the Company relative to the abandonment of the line, or at any other time, adverse to the proceedings of the directors, either by the Plaintiff or any other shareholder, until the filing of the present bill. This Court does not interfere with the legal powers contained in an Act of Parliament; and the directors, in the present case, having given notice of their proceeding to construct the first portion of their line, the case is one for mandamus, and not for an application to a Court of Equity. The case of *The Queen v. The Eastern Counties Railway Company* (a) shews that the contract is one with the public.

[The LORD CHANCELLOR.—If that be so, it is, *à fortiori*, a

(a) 10 Ad. & E. 531.

1849.
 COHEN
 v.
 WILKINSON.
 —
Argument.

contract with the shareholders individually to complete the whole extent of the line.]

In the case of *Colman v. The Eastern Counties Railway Company* (a), the funds had been subscribed for constructing a railway and for no other purpose, and the doctrine laid down in *Frewin v. Lewis* (b) was there carried out. In *Cooper v. Earl Powis* (c), which came before this Court on the 24th of March, 1849, there had been an amalgamation of three intended lines of railway, and there was a large debt due to the mortgagees of a canal, which had been purchased by the Railway Company: the directors in that case made calls on the shareholders for the purpose of satisfying the mortgages on the canal, although they had ample funds for the construction of the intended line of railway; and this Court there held, that the satisfaction of the mortgage debt was within the legal powers given the Company by their Act of Parliament, and declined to interfere therewith. The next objection to the bill is, that, notwithstanding the reports of the directors, which were read at the meetings of the shareholders in the Company, in August, 1848, and February, 1849, in which the Plaintiff must be considered to have acquiesced, the Plaintiff did not file his bill until the month of June, 1849; the notices, moreover, to the landowners of the intention of the directors to take the lands along the course of the proposed line, having been served shortly after the month of February, 1849, the damage done to the Company, by restraining it from constructing the portion of the line objected to by the Plaintiff, will be irreparable, whilst the Plaintiff can sustain no loss or damage by the construction of a portion only of the line.

The following cases were also cited in support of the ap-

(a) 10 Beav. 1.

(b) 4 My. & Cr. 249.

(c) Not reported.

peal:—*Ware v. Grand Junction Waterworks Company*(a), *Salmon v. Randall*(b), *Agar v. The Regent's Canal Company*, mentioned in the note to the case of *The Mayor of King's Lynn v. Pemberton*(c), *Lord v. Copper Miners' Company*(d), *Walker v. Eastern Counties Railway Company*(e), *Stanley v. Chester and Birkenhead Railway Company*(f).

1849.
COHEN
v.
WILKINSON.
Argument.

The LORD CHANCELLOR (without calling on Mr. *Rolt* and Mr. *W. H. Cole*, who appeared for the Plaintiff), expressed himself to the following effect:—

The question is, whether the funds of this Company can be legally applied by the Directors to a purpose different from that for which they have been subscribed by the shareholders? It is well settled, the directors cannot do anything of the kind. If so, the only question is, whether the line of railway proposed to be constructed from *Epsom* to *Leatherhead* is equivalent to a line to be constructed from *Epsom* to *Portsmouth*. The latter might be deemed by the shareholders a good and valuable undertaking, but not so the former; I have assumed that a party subscribing his money for one purpose has a right to say it shall not be applied to a different purpose. The injunction granted by the *Master of the Rolls* is very correctly worded, so as not to interfere with the completion, by the Company, of the whole undertaking; for it very properly restrains the Company from applying the funds for purposes not mentioned in the Act of Parliament, which authorises the construction of the line. It has been argued, that this is an interference with the legal powers of the Company; whereas, it appears to me to be quite the reverse, inasmuch as the Company is left in the full possession of its legal powers, and is only restrained

Judgment.

(a) 2 R. & M. 470.
(b) 3 M. & C. 439.
(c) 1 Swanst. 250.

(d) Ante, p. 85; S. C., 2 Ph. 740.
(e) 6 Hare, 594.
(f) 1 Railw. Cas. 58.

1849.

COHEN
v.
WILKINSON.

Judgment.

from doing that which would be a breach of those powers. Every case resembling the present which I have hitherto decided, establishes the right which the Plaintiff claims; and in the Court of Queen's Bench the Judges have established the doctrine, that a Company obtaining an Act of Parliament for the purpose of constructing a railway from *A.* to *B.*, have entered into a contract with the public, and are liable to proceedings by mandamus, if they derogate therefrom; and the decision of the *Master of the Rolls*, in the present case, assumes the existence of a contract between the Company and the subscribers to the undertaking. I assume, then, that the Plaintiff has a right to enforce that contract to which he has subscribed. The only point in the case which it is difficult to explain, is the alleged acquiescence of the Plaintiff. It is said, that the Plaintiff, knowing what had taken place, viz. that the works were confined to the construction of the line between *Epsom* and *Leatherhead*, raised no objection thereto, but permitted the Company to enter into contracts with the landowners, and then, when the Company had embarrassed itself with such contracts, from which it could not escape, the Plaintiff, for the first time, raised the objection to the construction of the partial line of Railway.

Mr. *Rolt* then stated, that that point was never taken when the case was before the *Master of the Rolls*, but was then suggested for the first time, and that there was no evidence whatever to support it.

Such appearing to be the fact, the LORD CHANCELLOR dismissed the appeal with costs.

1849.

In re BARTHOLOMEW'S TRUST.

Nov. 13th.

THOMAS BARTHOLOMEW, by his will, dated the 8th of March, 1820, bequeathed a sum of 2000*l.* to trustees, in trust for the benefit of his daughter, *Mary Ann Buller Bartholomew*, for her life, for her separate use; and after her decease, then the trustees were to "stand possessed of, and interested in, the said sum of 2000*l.*, upon trust, to pay the same, or assign the security or securities whereon the same might be then placed or invested, unto, between, or amongst all and every the child and children of his said daughter *Mary Ann*, as and when they should severally attain the respective ages of twenty-one years, in equal shares and proportions, share and share alike; to whom he gave and bequeathed the same accordingly; with benefit of survivorship to and amongst such child or children, in case of the death of any one or more of them before such share or shares of and in the said sum of 2000*l.* should become payable." And he afterwards directed, that his trustees should, after the death of the daughter, pay and apply the interest and dividends of the said 2000*l.* for and towards the maintenance, clothing, and education of such child or children of his said daughter *Mary Ann*, until their respective shares thereof should become payable, in proportion to their respective shares therein, as the trustees should in their discretion think fit.

Bequest to trustees in trust to pay the annual income to *A.* for her life, and after her decease to assign the trust fund to *A.*'s children, as and when they should severally attain twenty-one, in equal shares, to whom the testator gave the same accordingly; with benefit of survivorship, if any of them died before his share became payable; and a direction to apply the income for maintenance during minority:—
Held, that the only child of *A.*, who died under twenty-one, took a vested interest.

—
Statement.

The testator died in 1826. His executors renounced; and his son, who was also residuary legatee and devisee, took out letters of administration to his effects.

Mary Ann married the Petitioner, and had issue one child only, who died unmarried, an infant. *Mary Ann* died in 1847.

1849.

In re
BARTHOLO-
MEW'S TRUST.

—
Statement.

The money was paid into court under the 10 & 11 Vict. c. 96. The father of the infant presented a petition for the payment of the money to him as representative of the child. The petition was heard by the *Vice Chancellor of England* on the 31st of March, 1849; when his Honor considered the legacy as vested in the child, and made an order in accordance with the prayer of the petition.

This was a petition by the executor of the residuary legatee, praying that that order might be discharged, and the petition dismissed.

Argument.

Mr. *Malins* and Mr. *Hobhouse* for the Petitioner.

This is a gift to trustees, with a direction to pay at a future period, which period is to be ascertained by the children attaining twenty-one. If that event never happens, then no payment is to be made. In *Leake v. Robinson* (a), which was stronger than this case, because it was a bequest of residuary estate, Sir *William Grant*, after referring to *Booth v. Booth* (b), says, that that case "shews that where there is no gift but by a direction to transfer from and after a given event, the vesting would be postponed till after that event had happened." In this case there is a gift after the direction to pay, but the gift is "to whom," that is to say, the children who were before referred to, namely, those who should attain twenty-one, "I give and bequeath the same accordingly." The word "accordingly" would prevent the gift from being carried further than the direction to pay. The effect was the same as if the gift had been to "such children as should attain twenty-one;" and Sir *William Grant* considered that under that expression "none but a person who could predicate of himself that he had attained [twenty-one], could claim anything under such a gift" (c). There is a clause of survivorship in this

(a) 2 Mer. 387.

(b) 4 Ves. 399.

(c) 2 Mer. 388.

will, but there was a similar clause also in *Leake v. Robinson*, and it was considered not to alter the construction of the other part of the bequest(a). There is also a provision for the maintenance of the children, but a discretion is left to the trustees, and therefore that provision will not make the interest vested: *Leeming v. Sherratt*(b), *Vawdry v. Geddes*(c), *Watson v. Hayes*(d), *Hanson v. Graham*(e), *Boraston's case*(f).

1849.
In re
BARTHOLO-
MEW'S TRUST.
—
Argument.

Mr. Rolt, Mr. Lloyd, and Mr. Nalder, *contrà*.

The distinction between this case and *Leake v. Robinson* is, that in this case there is a direction to pay, which was not found in the other case. The gift is to all and every the child and children of the testator's daughter, and the word "accordingly" refers to the direction that the legacy is to be divided in equal shares. In this case also there is a proviso directing that the whole of the income shall be applied in the maintenance of the children, the trustees having merely an option as to the mode of applying it. That provision is sufficient to give the children a vested interest: *Hammond v. Maule*(g).

The LORD CHANCELLOR said, that the construction which must be put upon the expressions of the will, excluded all difficulty from the case, and brought it within the rule laid down by Sir William Grant in *Leake v. Robinson*(h). The rule was, that, where there was an antecedent gift, a direction to pay upon the attainment of a certain age would not postpone the vesting of the legacy; but if there was no antecedent gift, prior to that contained in the direction to

Judgment.

(a) 2 Mer. 388.

(b) 2 Hare, 17.

(c) 1 Russ. & M. 203.

(d) 5 Myl. & Cr. 125.

(e) 6 Ves. 246, 247.

(f) 3 Rep. 19.

(g) 1 Coll. 281.

(h) 2 Mer. 363.

1849.

*In re*BARTHOLO-
MEW'S TRUST.*Judgment.*

pay, the attainment of the required age would be necessary to enable the legatees to take vested interests. The question, therefore, was, whether the will, in the present instance, contained a gift to the legatees, independent of the direction to pay; and he was of opinion that it did. After the direction to the trustees to pay, came the words, "to whom I give and bequeath the same accordingly." Those were words of direct gift to whatever parties "to whom" referred; and he considered those words referred as plainly to "all and every the child and children of the testator's daughter," as if the words "all and every the child and children" had been repeated; and if those words of gift had come before the direction to the trustees to pay, no doubt could have been felt. The question then turned upon the word "accordingly:" but he thought any other construction than that which referred it to all the children, would be contrary to the intention of the testator, and would be founded on nothing but strict rules of technicality. He thought the gift was immediate to the children of the daughter of the testator, and that it was the payment alone which was postponed till they attained twenty-one. If the gift had been to such only of the children as should attain the age of twenty-one, the clause of survivorship would have been quite useless; and it also was to be observed, that, by the clause for maintenance, every child was to enjoy the interest of the whole of his share, and that the trustees had no discretion to exercise except as to the mode of its application. He, therefore, was clearly of opinion that the *Vice-Chancellor* was right in his construction of that part of the will, and the appeal must be dismissed with costs.

1849.

SAWYER *v.* MILLS.

Nov. 22nd.

A TESTATOR, who died in 1831, devised certain real estate to three of his sons, upon trust, as soon as conveniently might be after his decease, to sell and invest the proceeds, and accumulate the interest till the youngest child of his daughter *Maria*, who should be living at his decease, should attain twenty-one, and then to divide the fund equally among all the children of *Maria* who should be then living; but if the trust fund exceeded 2300*l.*, then the surplus was to be divided among such of the testator's sons as might be then living, in equal shares.

The testator's daughter *Maria* left four children, the Plaintiff and his three brothers, the youngest of whom attained twenty-one in September, 1849. In 1846 the Plaintiff agreed to mortgage his share to *Mercy Sawyer*, who died in 1848, and in March, 1849, he made a second mortgage to *Edward Cutler*. One of *Mercy Sawyer's* executors was also one of the executors and trustees under the will of the testator.

In March, 1849, the Plaintiff filed this bill, in which he charged the trustees with several breaches of trust, on the ground that they had not sold the estate nor accumulated the rents. The bill also stated several counter claims which the Plaintiff had against *Mercy Sawyer*, and alleged that, in fact, nothing was now due under the equitable mortgage to her.

The bill prayed the performance of the trusts of the will as far as related to this specific devise, and a declaration that the trustees had been guilty of a breach of trust, and second mortgagee receiving their costs up to that time, and the Plaintiff's share being paid into court.

A testator directed real estate to be sold and the proceeds divided. One of the parties interested made two mortgages of his share, and then, before the trust fund was divisible, filed his bill against all the other parties interested, for the performance of the trusts, charging the trustees with a breach of trust in not selling the estate and accumulating the income as directed by the will. When the fund became divisible, the trustees paid each of the other legatees his share. One of the trustees under the will was one of the personal representatives of the first incumbrancer. A motion on behalf of all the Defendants, except the second mortgagee, that the bill might be dismissed as against all the Defendants except him, and the parties who claimed under the prior mortgage, was granted: the Plaintiff and the

1849.
SAWYER
v.
MILLS.
—
Statement.

directions consequential thereupon; and, if necessary, an account of the rents and profits, and an account of what was due under the equitable mortgage to *Mercy Sawyer*, and also of what was due to *Cutler* under his mortgage, and that the trustees might pay the costs of the suit.

The Defendants were the three trustees, and the other sons of the testator, who were entitled to the surplus of the proceeds of the estate after raising the sum of 2300*l.*, the personal representatives of *Mercy Sawyer*, the Plaintiff's three brothers, and *Cutler*.

The three trustees paid to each of the Plaintiff's brothers one-fourth part of the 2300*l.*, and had informed the Plaintiff of their intention to pay his share into court, unless he consented to its being paid to the executors of *Mercy Sawyer*, which he declined to do. A motion was then made on behalf of all the Defendants except *Cutler*, that the trustees might be ordered, on or before the 15th of November, 1849, to pay into the Bank, to the credit of this cause, 575*l.*, being one-fourth of 2300*l.*, together with interest from the 25th of September, when the Plaintiff's youngest brother attained twenty-one, and that the costs of the Plaintiff and *Cutler*, up to the present time, might be taxed and ordered to be paid by the trustees, and that, upon payment of the same into the Bank, and of the costs, the bill might be dismissed without costs, as against all the Defendants, except *Cutler* and the representatives of *Mercy Sawyer*, and that, in the meantime, all proceedings in the suit might be stayed, except to enforce the order to be made on this application.

The motion was first made before the *Vice Chancellor of England*, who refused it, with costs. It was now renewed before the *Lord Chancellor*.

Mr. *Rolt* and Mr. *Craig*, in support of the application, insisted that the Plaintiff had never been injured or placed in a position in which he was likely to be injured by the proceedings of the trustees. If the estate was not sold, it remained as a security for the Plaintiff's benefit; that the trustees now offered all which the Plaintiff was entitled to ask from them, and they ought not to be compelled to be parties to any litigation which was rendered necessary for the purpose of investigating the respective claims of the different mortgagees on the Plaintiff's share, nor ought they to be subjected to any expense upon that account. They cited *Sivell v. Abraham*(a) and *Pemberton v. Topham*(b).

1849.
 SAWYER
 v.
 MILLS.
 ———
Argument.

Mr. *Stuart* and Mr. *Toulmin*, *contrà*, contended, that the Defendants were not entitled to stop the suit unless they gave to the Plaintiff all which he sought by his bill. The default of the trustees in not selling the estate, had prevented the Plaintiff from knowing what he was to receive, or whether there was any definite sum to meet his claim. He had sustained inconvenience by these means, and he asked by the bill that the trustees might pay all the costs of the suit. Unless, therefore, they offered to do so, this motion ought not to be granted: *Damer v. Earl of Portarlington*(c).

The LORD CHANCELLOR:—

This case comes strictly within the jurisdiction which the Court exercises, that, on the Plaintiff receiving, not all which he asks, but all which he appears on the face of the pleadings to be entitled to, the bill will be dismissed. Here is a party entitled to a sum of money to be paid out of real estate when the youngest child of *Maria Sawyer* should attain twenty-one. The fund not being then divisi-

Judgment.

(a) 8 Beav. 598.

(b) 1 Beav. 316.

(c) 2 Ph. 30.

1849.

SAWYER

v.

MILLS.

Judgment.

ble, the Plaintiff filed this bill for securing the fund, and it appears that he had found it expedient to raise money upon his share in this trust property. This he has a clear right to do; but, having encumbered his future interest, he finds it necessary to bring the incumbrancers before the Court. The suit may be proper enough in order to secure the fund, but the necessity of making these mortgagees parties arises from the act of the Plaintiff. Why, then, should the trustees be rendered liable to pay the costs of all those parties? What is it that the Plaintiff can possibly do in this suit? He says that there are some damages sustained by him by what is called a breach of trust. But how can this be the case? The money is forthcoming. The fund is secure: and whether it exists as money or as an estate is not material, provided the money is ready. All which remains is a contest between the legatee and other parties in whose favour he has charged his legacy. When a Defendant offers that which is asked as against him, giving the Plaintiff all which he shews himself to be entitled to, as against that Defendant, the Court, in order to stop litigation, will prevent any further proceedings in the suit. Upon payment of the money into court, with interest, and the costs, including the costs of the application to the *Vice-Chancellor*, the motion must be granted.

Nov. 24th.

In re HARWOOD.

On a petition presented by the bankrupt, with the consent of his creditors, to the *Lord Chancellor*, seeking to annul the fiat issued against him previously to the passing of the Bankrupt Law Consolidation Act, the *Lord Chancellor* granted the order to annul the fiat, but on the express grounds of there being proceedings pending.

THIS was the petition of *J. D. Harwood*, a bankrupt, to the *Lord Chancellor*, seeking an order annulling the fiat issued against him on the 15th of September, 1849. Shortly after the adjudication of bankruptcy, an arrange-

ment was made between the bankrupt and his creditors, and the fiat issued against him previously to the passing of the Bankrupt Law Consolidation Act, the *Lord Chancellor* granted the order to annul the fiat, but on the express grounds of there being proceedings pending.

ment was effected, by which the creditors accepted, and were paid 10s. in the pound on the amount of their debts; on the 3rd of October, the meeting advertised for the choice of assignees, was held, and the choice adjourned to enable the bankrupt to petition to annul the fiat, with the consent, of that date, of all the creditors who had proved debts. On the 11th of October, the usual certificate from the Commissioner was obtained, and shortly afterwards the bankrupt presented his petition to Vice-Chancellor *Knight Bruce*, seeking to annul the fiat, when his Honor expressed an opinion that he had no jurisdiction, and requested that the matter might be submitted to the *Lord Chancellor* for his consideration. The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), came into operation on the 11th of October, 1849.

1849.

In re
HARWOOD.

Statement.

Mr. *Bacon*, in support of the petition, referred to the 1st, 2nd, 4th, and 230th sects. of the Act (*a*).

Argument.

(*a*) Sect.1. "That, from and after the commencement of this Act, the several Acts and parts of Acts set forth in the schedule A. to this Act annexed, to the extent to which such Acts or parts of Acts are by such schedule expressed to be repealed, and every other Act or Acts, and such parts of every other Act or Acts, as shall be inconsistent with this Act, shall be repealed, except so far as the said Acts, or parts of Acts, or any of them, whether mentioned or included in the said schedule or not, repeal any former Act, or part of an Act, and except also so far as may be necessary for the purpose of supporting any proceedings taken or to be taken under and after the commencement of this Act upon any trading, act of bank-

ruptcy, petitioning creditor's debt, fiat, or other proceeding in bankruptcy before the commencement of this Act, and except as to the recovery and application of any penalty for any offence which shall have been committed before the commencement of this Act.

Sect.2. "And be it enacted, that in citing this Act in other Acts of Parliament, or in any instrument, document, or proceeding, it shall be sufficient to use the expression, 'The Bankrupt Law Consolidation Act, 1849.'

Sect.4. "And be it enacted, that this Act, unless where otherwise specially provided, shall commence and take effect from and after the 11th day of October next; and that, from and after the commencement of this Act, no fiat

1849.

In re
HARWOOD.

Judgment.

Mr. *Selwyn* appeared for the creditors.

The LORD CHANCELLOR, after observing, that the Bankrupt Law Consolidation Act, 1849, took away fiats alto-

in bankruptcy shall be issued, but all proceedings in bankruptcy, or to found an act of bankruptcy, shall, and proceedings for arrangement between debtors being traders, liable to become bankrupt, and creditors may be, by virtue of and according to the provisions of this Act, and that all proceedings in bankruptcy, and every fiat in bankruptcy and petition for such arrangement depending at the commencement of this Act, shall be proceeded in and brought to a conclusion under the provisions of this Act: Provided that every trading, act of bankruptcy, petitioning creditor's debt, or other matter or thing, which, before the commencement of this Act, would have authorised proceedings in bankruptcy, shall, after the commencement of this Act, be sufficient to authorise proceedings in bankruptcy under this Act; and nothing in this Act contained shall render invalid any proceedings in bankruptcy, or any fiat in bankruptcy, or any petition for arrangement depending at the commencement of this Act, or any proceedings which may have been instituted or taken under or by virtue of such bankruptcy, fiat, or petition, or lessen or affect any right, title, claim, demand, or remedy, which any person now has, or hereafter may have under or by virtue thereof, or lessen or affect any

right, title, claim, demand, or remedy, which any person now has, or hereafter may have upon or against any bankrupt against whom any fiat has or shall have been issued, or against any such trader who may or shall have presented such petition, except as in this Act is hereafter specially provided: Provided always, that nothing in this Act contained shall affect the provisions of the "Joint-stock Companies Winding-up Act, 1848," or any of the Acts therein recited, or of any Act amending such Act, except so far as regards the abolition of the fiat in bankruptcy, and the substitution of a petition for adjudication of bankruptcy."

Sect. 230. "That any bankrupt, at any time after he shall have passed his last examination, may call a meeting of his creditors (whereof and of the purport whereof, twenty-one days' notice shall be given in the *London Gazette*), and if the bankrupt or his friends shall make an offer of composition, and nine-tenths in number and value of the creditors assembled at such meeting shall agree to accept the same, another meeting for the purpose of deciding upon such offer, shall be appointed to be holden, whereof such notice shall be given as aforesaid, and if at such second meeting nine-tenths in number and value of the

her, and that the question seemed to be, whether the present was a proceeding under the fiat, said, that in the case of a fiat issuing previously to the Bankrupt Law Consolidation Act, 1849, and nothing done therein, he was at some loss for authority to deal therewith. His Lordship, however, finally, and after some hesitation, granted the order, but on the express ground of there being proceedings pending.

1849.
In re
 HARWOOD.
Judgment.

WILLYAMS v. HODGE.

Nov. 26th.

THIS was a motion to discharge an order of the Vice-Chancellor *Knight Bruce*, that the Defendant should have a guardian assigned to him to put in his answer. *Hodge* was the sole Defendant in this suit, and had had an attack of paralysis before the bill was filed, and was still suffering from the effects of it; and it was stated in the affidavits of his medical attendants and others, that although he was in complete possession of his mental faculties, he was in such a state of health that if he was applied to about the matters in question in this suit, it would tend to the aggravation of his disease, and in all probability would be attended with imminent danger to his life. Before the *Vice-Chancellor* made the order, he had required a statement to be made on affidavit, by one of the Defendant's family, of all the documents in the possession of the Defendant which related to this suit.

Where a Defendant was unable from illness to put in an answer, but was in possession of his mental faculties, an order for assigning him a guardian to put in his answer, was discharged, the proper course in such a case being to apply for an extension of time for putting in an answer.

creditors then present shall also agree to accept such offer, the Court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the Court shall direct, annul the adjudication of

bankruptcy, and supersede or dismiss the fiat or petition for adjudication; and every creditor of such bankrupt shall be bound to accept of such composition so agreed to."

1849.
 ┌───┐
 WILLYAMS
 v.
 HODGE.
 ───
Argument.

Mr. *James Parker* and Mr. *Renshaw* in support of the motion.

There is no authority for such an order, except in cases of unsoundness or incapacity of mind. The Defendant might be allowed an extension of time for putting in his answer, and the Plaintiff might then consent to take his answer without oath or signature, if he wished to proceed with the suit, or wait till he could obtain a full answer from him; but the order which has been made gives no better protection to the Defendant, and may be a serious injury to the Plaintiff.

Mr. *Wigram* and Mr. *W. M. James*, for the Defendant.

A similar order was made by the *Vice-Chancellor of England*, in a case which was lately before him. Under the 5 Eliz. c. 9, s. 12, if a party who was in such a state of health as the Defendant in this suit, had been summoned as a witness, and had failed to appear, a Court of common law would have considered his illness as a "reasonable let or impediment," and would not have imposed any fine or penalty upon him.

The LORD CHANCELLOR (without hearing a reply):—

Judgment. The old practice of the Court has already sufficiently provided for cases of this description, and I am not at all disposed to extend to them the practice of appointing guardians to put in an answer. It is impossible that the Court will compel a party to put in an answer at the danger of his life. But if this mode of protection, by having a guardian appointed, is adopted, there will be an end to the

Plaintiff's right to have even a chance of getting an answer from the Defendant at all, even if he recovers. On the other hand, if the Court grants the Defendant further time to answer, and then extends it from time to time, as occasion may require, the Defendant is as effectually protected as he would be by the appointment of a guardian. Why, then, is it necessary to introduce a new practice, when the old practice sufficiently provides for the case? If the Defendant recovers, the Plaintiff may then require an answer; or if he does not think proper to delay the cause, he may accept an answer without oath or signature. But he is entitled to have such an option as the old practice allows him, but which the new practice would deprive him of; while, in either case, the Defendant will be equally protected.

1849.
 WILLIAMS
 v.
 HODGE.
 ———
Judgment.

I think the old practice already answers the purpose of the parties, and the order of the *Vice-Chancellor* must be discharged with costs.

1849.

Nov. 7th.

In re THE CAMBRIDGE AND COLCHESTER
RAILWAY COMPANY, *Ex parte* MARSH.

At a meeting to settle the list of contributories to a Company, which had been ordered to be wound up under the Joint-stock Companies Winding-up Act, 1848, the list which was produced, was held to have been irregularly deposited:—*Held*, that neither the Master nor the Court had jurisdiction to order the official manager to pay the costs of the alleged contributories, who had been summoned by him to attend the meeting.

—
Statement.

AN order was made in May, 1849, under the Joint-stock Companies Winding-up Act, 1848, for winding up the Cambridge and Colchester Railway Company. The Petitioner obtained a list of the alleged contributories from one of the late solicitors of the Company, and left it in the Master's office; and each of the persons named in that list received a copy of the advertisement of the meeting at which the official manager was to be appointed. On the 18th of June, 1849, the meeting took place, at which the official manager was appointed; and the Master appointed the 9th of July to settle the list of contributories. Upon that day an objection was taken by the alleged contributories, that, as the list of contributories had been prepared by the original Petitioner, and not by the official manager, the Master could not proceed upon it. The official manager stated that he adopted the list, which had been carried in before his appointment. The Master, however, was of opinion that he could not proceed upon that list, and he ordered the costs of the alleged contributories to be paid out of the general estate of the Company.

A motion was then made before the Vice-Chancellor *Knight Bruce*, on behalf of one of the alleged contributories, that the order of the Master might be varied, either by directing that the said costs should be paid by the official manager, or by directing that they should be paid by him, and allowed to him out of the general estate of the Company. The Vice-Chancellor *Knight Bruce* directed the motion to stand over, with liberty for any of the parties to apply.

motion was now renewed before the *Lord Chan-*
and it was also asked by the motion, that the order
Vice-Chancellor might be discharged.

Roundell Palmer supported the motion, and Mr.
Russell and Mr. *Roxburgh* opposed it.

26th, 59th(a), 64th, 76th, 77th, 95th, 96th(b),
(c), 104th, 105th, and 106th sects. of the Joint-stock
Companies Winding-up Act, 1848, were referred to.

The 59th sect. enacts, "That
no decree, order, or judgment
shall be made or entered up against
the official manager of any Com-
pany representing the same,
nor shall any decree or order be executed against
his person or property of the
kind which he may for the time being
be an official manager, other-
wise than as a contributory, and
every official manager shall
be fully reimbursed and
indemnified out of the assets of
the company, or out of the cre-
dit thereof, and, if necessary, by
debts due to be made on the contri-
butions, for all losses, costs,
damages, and expenses,
with deduction, save and ex-
cept, if any, losses, costs,
damages, and expenses,
which have been unduly or im-
properly sustained or incurred by
the official manager."

The 96th sect. enacts, "That
the Master, in addition to all
the powers and authorities vested in
him by this Act, shall, in pro-
ceedings under any reference to be
made to him by any such order

absolute or otherwise, under this
Act, have and exercise all the
powers and authorities, not being
at variance with the powers and
authorities vested in him by this
Act, which he could in anywise
have and exercise under the prac-
tice of the Court in any matter
referred to him by a decree or
order made and pronounced in a
suit."

(c) The 103rd sect. enacts, "That
the general costs of winding up
the estate, and the costs of prov-
ing debts and of trying issues,
and of all other matters in which
creditors, or any particular con-
tributors, or classes of contribu-
tories, or alleged contributories of
such Company, shall be interested,
shall be at the discretion of the
Master, and shall be paid either
out of the general estate of such
Company, or out of any portion of
the general estate, or shall be de-
bited or credited to any individual
contributories, or classes of contri-
butories, or shall be subject to
such set-off as the Master shall
from time to time direct."

1849.

In re
THE CAM-
BRIDGE AND
COLCHESTER
RAILWAY Co.,
Ex parte
MARSH.

Argument.

1849.

In re
THE CAM-
BRIDGE AND
COLCHESTER
RAILWAY CO.,
Ex parte
MARSH.

—
Judgment.

THE LORD CHANCELLOR said, that the 96th sect. gave the Master power to award costs in all cases in which he could have given costs if there had been a reference to him under a decree. If there had been a decree in this case, instead of an order under this Act, and a party had been improperly brought before the Master, as liable to pay some sums to the Company, could the Master have awarded him costs as against the official manager? The error in the Act seemed to consist in this: that it had taken away the jurisdiction of the Court without giving it to the Master, allowing the Master no more discretion than he would have had upon a reference under a decree. His Lordship thought that neither the Master nor the Court could order these costs to be paid by the official manager, and he must refuse the motion with costs.

Nov. 7th, 8th, & 10th. *In re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY, *Ex parte* HALL

A widow was entitled, as executrix of her deceased husband, to some shares in a joint-stock banking Company, which stood in the name of her husband. On her second marriage she assigned them by

AN order had been made under the Joint-stock Companies Winding-up Act, 1848, for winding up the affairs of the North of England Joint-stock Banking Company; and the Master to whom the case was referred, had inserted the name of *John Hall* in the list of contributories in respect of six shares. An application was afterwards made to the Vice-Chancellor *Knight Bruce* to discharge the order, when his Honor directed *Hall's* name to be retained in the

deed to a trustee for her separate use. Verbal notice of that deed was given to the Company, but no transfer of the shares was ever made in the manner required by the Company's deed of settlement. The trustee received the dividends, and signed receipts for them as agent for the widow, but his name was never returned to the Stamp Office as a shareholder until the stoppage of the bank:—*Held*, that these facts were not sufficient to authorise the Master to insert the name of the trustee in the list of contributories, under the Joint-stock Companies Winding-up Act; but leave was given to the official manager to try the question of the trustee's liability in an action at law, the Court refusing an issue for that purpose.

list, but held that his liability ought not to be extended further back than the 23rd of March, 1842, when the shares were assigned to him. The case was now brought before the *Lord Chancellor* upon two motions, one asking that the name of *John Hall* might be struck out of the list of contributories, and the other asking that the qualification or limitation inserted by the Vice-Chancellor *Knight Bruce* might be omitted.

1849.
 In re
 THE NORTH
 OF ENGLAND
 JOINT-STOCK
 BANKING Co.,
 Ex parte
 HALL.
 Statement.

Andrew Outerston had been duly registered in the books of the Company as the proprietor of six shares. He died in 1839; and, under his will, his widow, *Elizabeth Outerston*, who was also his executrix, became beneficially entitled to those shares. In 1842 she intermarried with Mr. *Taylor*; and, previously to that marriage, she executed a deed of assignment in the common form, by which those six shares, together with other property, were expressed to be assigned to *John Hall*, upon certain trusts for her separate use. The assignment was communicated by *Hall* to one of the officers of the Company, to prevent (as *Hall* stated) the dividends from being paid to any other party, and an entry respecting these shares was made in one of their books, that "*John Hall, 26, Brandling Place, is appointed trustee by deed of 23rd March(a), and invested with absolute control over them.*" The time at which that entry was made did not appear, but it was stated to have been made some time before the stoppage of the bank.

After the death of *Andrew Outerston*, his name had been several times returned to the Stamp Office as the holder of those six shares; and sometimes the name of his widow had been returned as the owner, and at other times *A. Outerston's* executor or trustee, or *E. Outerston's* trustee; but neither *Hall's* name nor *Taylor's* name had ever been

(a) The year was not inserted.

1849.

In re
THE NORTH
OF ENGLAND
JOINT-STOCK
BANKING CO.,
Ex parte
HALL.

Statement.

so returned until after the stoppage of the banking Company, when the names of *Elizabeth Outerston*, executrix of *Andrew Outerston*, and *John Hall* were returned.

Hall had also received the dividends, and had signed the dividend warrants in a variety of forms, as, "for executors of *A. Outerston*," "for executors of *A. Outerston* and self," "*per pro. Elizabeth Outerston*," "for trustees of *E. Outerston* and self," "*John Hall*, executor of *A. Outerston*," "for *E. Outerston* executor of *A. Outerston*, *John Hall*." One only was signed by him, with the addition of "*E. Outerston's* trustee," but these words were stated by *Hall* to have been added after he had signed the warrant, and without his knowledge. He had also attended some meetings of the shareholders; but it did not appear that he had ever voted. In March, 1847, the bank stopped payment.

By the 28th clause of the Company's deed of settlement it was provided, that the executor, administrator, or legatee of any deceased shareholder should not be a member of the Company in respect of such shares as should be vested in him in any of the aforesaid capacities respectively; but he should be at liberty either to sell and dispose of the shares so vested in him, subject to the provisions of the deed with respect to the sale and transfer of shares, or at his option to become a member of the Company in respect of such shares, upon complying with the provisions of the deed.

The 29th clause provided, that any executor, administrator, or legatee, who should be desirous of becoming a member in respect of the shares vested in him, in any of such capacities, should give notice in writing of such his desire, at the banking-house of the Company, whereupon and upon complying with the provisions of the deed of settlement,

he should be admitted a member in respect of such shares, and have the same transferred into his name accordingly, and should be personally charged with the duties and liabilities incident to the ownership of the same.

By the 30th clause it was provided, that an executor, administrator, or legatee, who should not, under the 29th clause, elect to become a member of the Company in respect of the shares vested in him in any such capacity, should be entitled to receive any dividend due before his title accrued, but that all future dividends should remain in suspense till the transfer of the shares should be completed.

By the 32nd clause it was provided, that every person to whom shares should be transferred, and who should not then be a member of the Company, and every person who, being the executor, administrator, or legatee of any deceased shareholder should, by such notice as aforesaid, signify his desire to become a member of the Company, should, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a member of the Company from the time of the shares being so transferred to or so becoming vested in him as aforesaid, but as to all profits, rights, privileges, benefits, and advantages to arise from the same shares, no such person should be considered as a member in respect of the same, until he should have executed the deed of settlement.

1849.
In re
 THE NORTH
 OF ENGLAND
 JOINT-STOCK
 BANKING Co.,
Ex parte
 HALL.

Statement.

Mr. *Malins* and Mr. *Hallett* appeared for *John Hall*, and contended that he had never incurred any liability at law in respect of these shares; that there was always some other party who was entered in the books of the Company as the proprietor of them; that *Hall* had nothing more than an equitable title as between himself and the

Argument.

1849.

In re
THE NORTH
OF ENGLAND
JOINT-STOCK
BANKING CO.,
Ex parte
HALL.

Argument.

proprietor of the shares, and that there was no liability or privilege as between him and the Company; that *Ness v. Armstrong*(a), *Ness v. Angas*(b), and *Armstrong's case*(c), were all in favour of *Hall's* exemption from liability, and that *Chartres' case*(d) and *Ex parte Morgan*(e) were cases in which the question was, whether the parties had got rid of the liability which they had clearly undertaken originally; but that, in this case, no liability had ever been incurred.

Mr. *Bacon* and Mr. *Headlam*, for the official manager, insisted, that these shares had been assigned to *Hall* as effectually as *Mrs. Outerston* could assign them by the deed of 1842; that *Hall* received the dividends, and had been accepted by the directors as a shareholder; and that the forms prescribed by the deed of settlement, for transfers of shares, must be held to have been waived by the mutual consent of both parties: *Burnes v. Pennell*(f). The 32nd clause of the deed of settlement expressly stipulated that, in certain cases, a party might incur all the liabilities without obtaining all the privileges of a shareholder.

Nov. 8th.

Judgment.

THE LORD CHANCELLOR:—

Nothing is more simple than the facts of this case, or than the law as applicable to those facts. A lady, who held certain shares as representative of her husband, being about to marry again, executed a deed professing to assign her interest in these shares; and from that act it has been argued that there was an actual transfer. Now, transfer there certainly is not; yet this gentleman, who came for—

(a) 18 Law J. R., (N.S.) Exch.,
473.

(b) Id. 470.

(c) 1 De G. & S. 565.

(d) Id. 581.

(e) Ante, p. 320, and 1 Mac. &
G. 225.

(f) Before the House of Lords,
July, 1849.

ward merely to protect the interest of this lady, as trustee under her marriage settlement, is attempted to be made a contributory, and liable personally to all the debts of this bankrupt concern. It would, unquestionably, be very hard if a party thus acting were to find himself involved in all these liabilities. If, however, the law throws that burden upon him, it is a hardship which he must endure. But before I impose it upon him, I feel great anxiety to see that the facts of the case clearly justify me in doing so.

1849.
In re
THE NORTH OF
ENGLAND
JOINT-STOCK
BANKING Co.,
Ex parte
HALL.
Judgment.

Now, no one can doubt the utility of the Winding-up Act; but it is of vital importance to parties, whether they are to be held liable as contributories; and I have no more right to deal lightly with a claim against a party as contributory, than I should have, if I were trying a case at *Nisi Prius*, to direct the jury to find for the Plaintiff before the case was proved against the Defendant; for it is nothing more or less than trying his liability to an extent which cannot be estimated. Whether his liability is founded on a principle of law or equity, is not very material; but I have to decide whether he is liable to the creditors of the concern.

I will state shortly what evidence there is that *Hall* had in any manner made himself a shareholder in this concern. [His Lordship then referred to the fact of *Hall's* communicating the effect of the deed of March, 1842, to some officer of the Company, and his motive for doing so as stated in his affidavit—the receipt of the dividends by him, but that none of the receipts were signed by him as assignee or owner of the shares.] In the case of an assignment, and the assignee not taking the proper steps subsequently to become a member, the deed of settlement provides, that after six months the shares are to be forfeited. So again, if, being assignee, he is desirous of becoming a member, he has certain means of bringing the

1849.

In re
THE NORTH OF
ENGLAND
JOINT-STOCK
BANKING CO.,
Ex parte
HALL.

Judgment.

matter under the consideration of the directors, whether they will receive him as a member or not. Now, neither of these steps is taken, either by the Company or by the person to whom the shares are assigned; but the whole that appears to have taken place was the transaction to which I have referred.

The Master on these grounds has held him to be a contributory, and therefore liable to contribute, in proportion to these shares, to all the liabilities of the Company. The Vice-Chancellor *Knight Bruce* has concurred in that opinion, with a certain qualification. Supposing an action were tried, legally raising the question of *Hall's* liability to the debts and obligations of the Company, is there the least chance, independently of technical difficulties, of any jury coming to the conclusion that he was liable? I should not speak so strongly as to the probable results of an action, were I not supposing an action where this evidence, and this evidence only, would be presented to the jury. If I am to deal with the question, I must deal with it upon the evidence before me, and I must make such observations as strike me to be proper to guide and regulate the conclusion to which I have come. If the Respondent still wishes to have an opportunity of trying the question at law, I will give him leave to do so. The question I have to try is, whether this party is a contributory. If I affirm the order, he is fixed with all the liabilities of the Company. As to that, I have my instructions from the Act of Parliament, which I cannot go out of. The Act says (a), "The word 'contributory' shall include every member of a Company," which *Hall* clearly is not, "and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the

(a) 11 & 12 Vict. c. 45, s. 3.

same, or as heir, devisee, executor, or administrator of a former member of the same, deceased, or otherwise howsoever." I have, therefore, to consider whether this party is proved before me to be liable in any character, independently of this Act, to contribute to the losses of the concern. I am of opinion that the evidence before me is not enough to shew such a liability; and in such a state of circumstances, the usual course is to give the other party an opportunity of proving at law the legal liability, if he wishes to do so.

1849.
In re
 THE NORTH OF
 ENGLAND
 JOINT-STOCK
 BANKING Co.,
Ex parte
 HALL.
 Judgment.

Mr. *Bacon* asked that the case might be tried at law by an issue instead of an action; but Nov. 10th.

The LORD CHANCELLOR said that the Court never directed an issue where, as in the present case, an action would try the question. He would order the motion to stand over, with liberty to the official manager to take such proceedings at law as he might be advised. In the meantime, *Hall's* name should be retained in the list of contributors, but no contribution was to be enforced from him.

In re THE DIRECT LONDON AND EXETER RAIL- Dec. 15th.
 WAY COMPANY, *Ex parte* HOLLINGSWORTH.

THIS was an application to the *Lord Chancellor*, on behalf of the official manager of the above Company, seeking It is no objection to the enrolment of an order, pronounced in one of the Courts below, under the Joint-stock Companies Winding-up Acts, 1848 and 1849, that it has been effected with unusual expedition; but a party will not be deprived of the opportunity of appealing against an order, if he have been thrown off his guard, and misled by his opponent, who afterwards enrols the order.

The mere statement by the unsuccessful party to his opponent, of his intention to appeal against an order, will not preclude the latter from the right to enrol the same.

The Joint-stock Companies Winding-up Acts, 1848 and 1849, do not affect the practice of the Court, applicable to the enrolment of orders or decrees.

1849.

In re
THE DIRECT
LONDON AND
EXETER
RAILWAY Co.,
Ex parte
HOLLINGS-
WORTH.

—
Statement.

that the enrolment, dated the 1st of December, 1849, of an order made by the Vice-Chancellor *Knight Bruce*, might be vacated. On the 3rd of August, 1849, the Master made an order in the matter for the payment by certain parties, solicitors, of a sum of money. On appeal from the order of the Master, the Vice-Chancellor *Knight Bruce*, on the 14th of November, 1849, discharged the same; but on the question as to the costs incurred by some of the parties before the Master, the Court ordered the matter to be again mentioned on the 19th of that month, when the same was disposed of. At an interview between the clerks of the two parties, on the 26th of November, 1849, a copy of the minutes of the order of Vice-Chancellor *Knight Bruce*, dated as of the 14th of that month, was produced to the clerk of the official manager's solicitor, by the clerk of the other parties, with which the former expressed his dissatisfaction, inasmuch as the order would be appealed from, and would, as regarded the date, if allowed to remain in its present form, deprive the official manager of five days' time, which might be of importance to him in case of delay arising in the passing and entering of the order. On Friday, the 30th of November, the two clerks met at the Registrar's office, in order to get the order properly drawn up, containing an insertion of the evidence adduced before the Master, when the clerk of the solicitors undertook to obtain the insertion of the evidence in the order, and a fee was then paid for the purpose of procuring the order earlier than (as was alleged) was allowed by the practice of the Court; the clerk of the official manager's solicitor could not, on the 1st of December, obtain any information from the clerk at the entering seat, as to whether the order had been taken away or not, but was led to believe that the order had not been taken away; but on Monday, the 3rd of December, which was alleged by the one clerk and denied by the other, to be the earliest day on which, according to the usual course of practice at the entering seat, the

order could properly be obtained, the clerk of the official manager's solicitor learned for the first time that the order had been entered and enrolled on the 1st of December by the clerk of the solicitors. The affidavit in support of the motion also stated that the enrolment of the order had been a *surprise* on the official manager's solicitor, and that the order could not have been enrolled if the usual practice and course of the Court had been followed by the solicitors, previously to the day on which the notice of appeal on behalf of the official manager was served, viz. the 3rd December. The allegation of the clerk of the official manager's solicitor, of his having, previously to the 1st December, informed the clerk of the solicitors of the intention of the official manager to appeal from the order of the *Vice-Chancellor*, was denied by the clerk of the solicitors.

1849.
 In re
 THE DIRECT
 LONDON AND
 EXETER
 RAILWAY Co.,
Ex parte
 HOLLINGS-
 WORTH.
 —
Statement.

By the Joint-stock Companies Winding-up Amendment Act, 1849, sect. 33, it is enacted, that no notice of motion for a rehearing before the *Lord Chancellor* shall be given after the expiration of *three weeks* from the date of the order complained of.

The 38th sect. of the same Act is as follows:—"That this Act shall be taken and construed (so far as practicable) as a part of the said Joint-stock Companies Winding-up Act, 1848."

By the 99th sect. of the Joint-stock Companies Winding-up Act, 1848, the manner and time for appealing from the decisions of the Masters is regulated. The 101st sect. of that Act enacts, "that every order made by the *Master of the Rolls* in *England* or *Ireland*, or any of the *Vice-Chancellors* in *England*, under that Act, may be reheard before the *Lord Chancellor* of *Great Britain* or *Ireland*, as the case may be, and such re-hearing may be brought before the *Lord Chancellor* by way of motion."

1849.

In re
THE DIRECT
LONDON AND
EXETER
RAILWAY Co.,
Ex parte
HOLLINGS-
WORTH.
 —
Statement.

And by the 118th sect. of the same Act, it is provided, "that the general practice of the Courts of Chancery in *England and Ireland*, in suits pending in the same courts respectively, so far as the same shall be applicable, and so far as the same is not or shall not be inconsistent with that Act, or with any rules or orders to be made under that Act, shall apply to all proceedings under or by virtue of that Act."

Argument.

Mr. *Swanston* and Mr. *Daniel* appeared in support of the application.

The right of a solicitor to enter a caveat, which stays the enrolment of an order, according to the well known practice of the Court, during a period of twenty-eight days, is inconsistent with the provision contained in the 33rd sect. of the Joint-stock Companies Winding-up Amendment Act, 1849: here the enrolment ought to be looked upon as not in existence, or at all events ought to be ordered to be vacated, on the ground of surprise on the Appellant.

[The LORD CHANCELLOR observed, that there was nothing in either of the Acts referred to, to prevent a party entering a caveat against enrolment immediately after the order was made, and if so, the case before the Court seemed to resemble a proceeding in a cause, any order in which might be enrolled in the usual way.]

The 101st sect. of the Joint-stock Companies Winding-up Act, 1848, gives a special right of re-hearing, and is a new and different right from that which a party is entitled to, according to the ordinary practice of the Court; and the Joint-stock Companies Winding-up Amendment Act, 1849, restricts the general right provided by the former Act, and says, that a party shall have twenty-one days allowed him

for moving to re-hear an order; and by that enactment it was intended, that the period of twenty-one days should be absolute and unqualified, and should render unnecessary any proceedings by way of caveat. The notice of motion was therefore given within the time limited by the Joint-stock Companies Winding-up Amendment Act, 1849.

Mr. *Lloyd*, Mr. *Hetherington*, and Mr. *Prior*, who appeared for the Respondents, were not called upon by

The LORD CHANCELLOR, who, after adverting to several of the sections of the two Winding-up Acts of 1848 and 1849, stated there was nothing in those Acts establishing a new practice touching the enrolment of orders and decrees of the Court, and that twenty-one days was the period allowed to a party appealing from an order, and twenty-eight days to a party seeking to enrol an order. As to the application, independently of the two Acts, his Lordship expressed himself as follows:—

The statement made on the part of the Appellant, that notice had been given to the clerk of the Respondents' solicitors, previously to the drawing up of the order, of the intention to appeal from the order of the *Vice-Chancellor*, is denied by that clerk, and the Court cannot, therefore, were it inclined to do so, act on it as a fact. The rule in cases of this nature is clear: the enrolment may be made with all the expedition possible, but the opponent must not be deprived of the opportunity of appealing from the order that has been obtained, by being thrown off his guard, and misled by his successful adversary; the party desiring to enrol an order is not to be deprived of that right; and the other party, if desirous of preserving his right of appeal, can easily accomplish that object by diligently entering his caveat. As regards the fee stated to have been paid as expedition money, such a proceeding is very objectionable; but still, if the officers

1849.

In re
THE DIRECT
LONDON AND
EXETER
RAILWAY Co.,
Ex parte
HOLLINGS-
WORTH.

Argument.

Judgment.

1849.

In re
THE DIRECT
LONDON AND
EXETER
RAILWAY Co.,
Ex parte
HOLLINGS-
WORTH.
 —
Judgment.

cannot dispatch the business by regular means, there is nothing unreasonable in their being compensated for extra hours of labour bestowed by them: all that can be urged in the present case is, that the successful party procured the order to be drawn up and entered as quickly as he could,—in short, one day earlier than was expected; he was guilty of no irregularity, and the order is not to be the less valid or binding because it did not stand over till Monday, the 3rd of December, when the notice of the appeal was served. With reference to the statement of notice having been given of an intention to appeal, it is established that that will not preclude the other party of the right to enrol the order (*a*), for it amounts to nothing more than saying the party will appeal some day or other; and unless there be an act done by the Court, as, for instance, the affixing the *Lord Chancellor's* fiat to a document, and the same be duly proceeded upon, the enrolment clearly may be made. The only point in the case is the allegation on the part of the Appellant of his solicitor's clerk having been misled by the clerk of the opposite party, which is positively contradicted. The application must, therefore, be refused, with costs.

On the application of the Appellant's counsel, it was ordered that the costs should be paid by the official manager, without prejudice to his having them out of the estate of the Company, if the Master, in his discretion, should think it a proper case in which to give him the costs, it being

(*a*) In *Stevens v. Guppy*, T. & R. 178 (1823), the Court vacated an enrolment of a decree that had been gained by surprise. In *Hughes v. Garner*, 2 Y. & C. 335 (1837), the Court declined to vacate the enrolment of a decree on the mere ground that it was obtained with extraordinary haste.

In *Dearman v. Wych*, 4 My. & Cr. 550 (1839), it was held that the enrolment of a decree or order would not be stopped by an appeal, if the order for setting down the appeal be not served before the enrolment is made. The last case was followed in *Groom v. Stinton*, 2 Ph. 384 (1847).

intimated to the *Lord Chancellor*, by the Appellant's counsel, that unless the order was made in that form, the Appellant would not be able to place before the Master such circumstances as might induce the Master to approve of the course taken by the Appellant, and allow him the costs out of the estate of the Company.

1849.

In re
THE DIRECT
LONDON AND
EXETER
RAILWAY Co.,
Ex parte
HOLLINGS-
WORTH.

Judgment.

In re THE UNIVERSAL SALVAGE COMPANY, *Ex parte* THE EARL OF MANSFIELD.

1850.

Jan. 12th
& 14th.

THIS was a motion to discharge an order of the Vice-Chancellor *Knight Bruce*, whereby his Honor directed the name of the Earl of *Mansfield* to be inserted or restored in the list of contributories in respect of twenty shares in the Universal Salvage Company. An order had been made, under the Joint-stock Companies Winding-up Act, 1848, for winding up the affairs of this Company; and the Master to whom it was referred, had excluded Lord *Mansfield's* name from the list of contributories; but, on motion before the Vice-Chancellor *Knight Bruce*, on behalf of the official manager, his Honor made the order which was the subject of the present application.

A party who applied for and obtained an allotment of shares in a Company, and paid the deposit on them, was held to be a contributory, although he had not signed the deed of settlement, nor paid any call, and no other act had been done to make him a member.

Contributories liable in respect of expenses, properly incurred by the directors, are not necessarily liable to losses or expenses incurred improperly by the directors.

In 1844, a project was formed for the establishment of the Universal Salvage Company. It was afterwards provisionally registered: Mr. *Murray*, a brother of Lord *Mansfield*, was a provisional director, and it was stated in the prospectus, that the capital of the Company was to consist of 4000 shares of 25*l.* each. One of the conditions provided, that if calls were not paid within thirty days after the day fixed for payment, the shares, with all payments already made, would be forfeited.

1850.

In re
**THE UNIVERSAL SALVAGE
 COMPANY,**
Ex parte
**THE EARL OF
 MANSFIELD.**

Statement.

Mr. *Murray* having applied for some shares for Lord *Mansfield*, twenty shares were allotted to his Lordship on the 27th of June, 1845. On the 30th of June, Lord *Mansfield* wrote a letter to the secretary, to acknowledge the receipt of the scrip certificates for twenty shares, and the deposit upon them of 5*l.* per share was paid on his behalf by his brother, Mr. *Murray*. Notices of the general meetings, and of a call upon his shares in August, 1846, were sent to his Lordship by the Company, but nothing further was done, either by his Lordship, to subject him to any liability to the Company, or by the Company, to enforce the call or to forfeit the shares. The deed of settlement was dated the 18th of August, 1845, and was registered in January, 1846, and Lord *Mansfield's* name was mentioned in the schedule as the allottee of twenty shares. The distinctive numbers of the shares in the scrip certificates and in the schedule annexed to the deed of settlement were different, but the *Lord Chancellor* did not consider that circumstance material.

It was stated, that the whole number of shares mentioned in the prospectus was not issued, but that the directors proceeded with a smaller capital, until the Company ultimately failed. These facts were not, however, in evidence before the Court.

Argument.

Mr. *Malins* and Mr. *Glasse* appeared in support of the application, and contended, that Lord *Mansfield* had merely secured a right to exercise an option whether he would take twenty shares or forfeit his deposit; that he preferred to abandon his right to the shares, and had never incurred any liability as a shareholder or member of the Company; and that, as the whole number of shares had never been issued, the directors were not authorised to proceed with

the Company, and that Lord *Mansfield* was not liable for any of its debts. They cited *Wontner v. Shairp*(a), *Walstab v. Spottiswoode*(b), *Fox v. Clifton*(c), *Pitchford v. Davis*(d), *Bell v. Lord Mexborough*(e), *Nockells v. Crosby*(f).

[The LORD CHANCELLOR.—According to your argument, no one would be liable except the directors; but the object of the Winding-up Act was to collect all the monies from all parties liable to pay.]

Mr. *J. Russell* and Mr. *Prendergast*, *contrà*, insisted that Lord *Mansfield's* acts, in applying for shares, acknowledging the receipt of the scrip certificates, and paying the deposits, rendered him liable as a member of the Company. The fact that Lord *Mansfield* did not sign the deed of settlement was unimportant upon this question: *Clements v. Todd*(g), *Ex parte Sadler*(h).

Mr. *Malins*, in reply, contended that the Company could not have sued Lord *Mansfield* for further calls, because they must have shewn that the Company was formed as originally projected: *Prendergast v. Turton*(i); and Lord *Mansfield* could not have claimed any profits to arise from the business of the Company, and therefore he was not a member of the Company.

[The LORD CHANCELLOR.—There are many cases in which expenses are necessarily incurred, as in railways, where a surveyor must be employed, though nothing further may be done. In such a case, could an allottee of shares ask to have all his money returned to him? The question here

1850.
In re
THE UNIVERSAL SALVAGE
COMPANY,
Ex parte
THE EARL OF
MANSFIELD.
Argument.

(a) 4 Railw. Cas. 542; 4 C. B. Rep. 404.

(b) Id. 321; 15 M. & W. 501.

(c) 6 Bing. 776.

(d) 5 M. & W. 2.

(e) 5 Railw. Cas. 149.

(f) 3 B. & C. 814.

(g) 5 Railw. Cas. 132.

(h) 15 Ves. 52.

(i) 1 Y. & C. C. C. 98.

1850.

In re
**THE UNIVERSAL SALVAGE
 COMPANY,**
Ex parte
**THE EARL OF
 MANSFIELD.**

Argument.

is, whether Lord *Mansfield* is liable to any portion of the expenses incurred.]

In *Nockells v. Crosby*(a) the parties recovered the full amount of their deposits, without any deduction for preliminary expenses.

Jan. 14th.

Judgment.

The LORD CHANCELLOR said, that he felt great difficulty in determining the case, in consequence of the want of information respecting the circumstances. Many facts had been stated which were not in evidence before him, and he must treat them as extraneous assumptions, and confine himself to what he found in the Master's report. [His Lordship then stated the transactions as to the allotment of the shares, and the payment by Lord *Mansfield* of the deposit.] It was contended that Lord *Mansfield* would not be liable to be sued by a creditor of the Company, but the 3rd sect. of the Winding-up Act included, as contributories, not only the members of the Company, but also every other person liable to contribute to the payment of any of the liabilities of it. Was not Lord *Mansfield* under that liability, having paid a deposit, and accepted scrip certificates of shares? Circumstances might have taken place which would relieve Lord *Mansfield* from his liabilities, but no case appeared on the Master's notes to shew that Lord *Mansfield* could be regarded otherwise than as a contributory. A notion seemed to be entertained by some persons, that all contributories were proportionally liable to contribute to the expenses of a Company. The Winding-up Act most carefully guarded against any such construction. When the Master had settled the list of all the parties liable to contribute, he had then a new duty to perform, namely, to distribute the proportions in which those

(a) 3 B. & C. 814.

parties were liable among themselves. If a Company had incurred great loss and great expense by improper management, or by the directors assuming to themselves powers which they never possessed, members who had not sanctioned those proceedings would not be liable for those losses; but that was very different from the question whether they were not liable to all the expenses properly incurred by the directors. It was not, however, to be assumed, that, because parties were inserted in the list of contributories, they were therefore liable to all the losses.

Lord *Mansfield's* name could not be struck out from the list of contributories, but the matter might be referred back to the Master to review his report, in order that the circumstances of the case might appear more clearly.

1850.

In re
THE UNIVERSAL SALVAGE
COMPANY,
Ex parte
THE EARL OF
MANSFIELD.

—
Judgment.

In re THE MADRID AND VALENCIA RAILWAY COMPANY, *Ex parte* JAMES. Jan. 17th.

THE question in this case was, whether a Company for making a railway from *Madrid* to *Valencia*, came within the scope of the Joint-stock Companies Winding-up Act, 1848.

An order for winding up the affairs of the Company had been made by the Vice-Chancellor *Knight Bruce*, in December, 1849, and the object of the present application was to discharge that order.

The Company was formed in 1845. The capital was to

Spain. The Spanish directors had been unable to raise one-third of the capital, and had therefore returned the deposits:—*Held*, that the Company was (so far as related to the English subscribers) within the scope of the Joint-stock Companies Winding-up Act, 1848, and that the circumstances authorised the interference of the Court under that Act.

An Association was formed for making a railway from *Madrid* to *Valencia*, by means of a Company, which was to be a *compania anonima*, having its *locale* in *Spain*, and being subject to the commercial code of *Spain*. Two-thirds of the capital were to be subscribed in *England* and the remainder in

1850.

In re
THE MADRID
AND VALENCIA
RAILWAY CO.,

Ex parte
JAMES.

—
Statement.

consist of 2,400,000*l.* divided into 120,000 shares of 20*l.* each, and one-third of the capital was to be appropriated to Spanish shareholders.

An ordinance of the Queen of *Spain* had been obtained in July, 1845, by which the Spanish Government conceded to *Prosper Besnard de Volney* the right to construct the railway, and to take all such parts of the Crown lands as should be required for that purpose; and the enjoyment of these rights was insured to the Company by an assignment from *Prosper Besnard de Volney* to a trustee for the Company. It was stated in the prospectuses and advertisements, that the *locale* of the Company would be in *Spain*, and that it would be formed on the principles of a *compania anonima*, agreeably to the commercial code of that country. The affairs of the Company were to be administered by a Council of Government, and a director resident in *Madrid*, and a consulting director in *London*. The Council of Government was to include one member of the English direction, resident in *Spain*, who was to possess two votes in the direction. There was also to be a board of directors in *London*, assisted by an influential Committee at *Madrid*. The Company had not been registered.

It was stated, in support of the two petitions on which the order for winding up the affairs of the Company was made, that the whole number of shares appropriated for Spanish shareholders had not been taken up, and the deposits on those which had been taken up had been returned to the depositors by the Spanish directors, and the project was in fact abandoned in *Spain*. The number of shares taken in *England* was much less than two-thirds of the proposed amount; but a large sum of money was in the possession of the English directors, and they had also transmitted a considerable sum to *Madrid*.

Mr. *James Russell* and Mr. *Glasse*, in support of the present application.

First, the Company is entirely a foreign Company, and is governed by the laws of *Spain*, and therefore not within the scope of the Joint-stock Companies Winding-up Act. Secondly, this litigation is merely an attempt on the part of the minority among the English shareholders, to make the majority, who wish to carry out the undertaking, submit to their terms; and the position of the Company does not warrant the interference of the Court, even if it were within the operation of the Act.

The Company is an anonymous Company, according to the provisions of the Commercial Code of *Spain*, and it must be governed by the ordinances of *Spain* in every particular. "The performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance" (a). The language of the Joint-stock Companies Winding-up Act is sufficiently general to include any Company, but where the domicile of the Company is in a foreign country, that Act cannot be applied. The Legacy Duty Act imposes a duty on every legacy; but if a legacy is given by a person domiciled in *Spain*, that legacy is not within the operation of the Act. Here the *locale* of the Company is in *Spain*, and therefore the Companies Winding-up Act will not affect it. If the Company should be dissolved, the money which is still lying at *Madrid* will probably be entirely lost.

1850.

In re
THE MADRID
AND VALENCIA
RAILWAY CO.,
Ex parte
JAMES.
—
Argument.

(a) Story on the Conflict of Laws, sect. 280; and see sect. 233.

1850.

In re
THE MADRID
AND VALENCIA
RAILWAY CO.,
Ex parte
JAMES.
 —
Judgment.

The LORD CHANCELLOR said, that he was clearly of opinion that this Company was within the scope of the Winding-up Act. The principal works were to be performed in *Spain*; but this was an English Company formed to assist in carrying on those works, and therefore it was subject to the Act. Evidence was necessary that there had been an abandonment or suspension of the works, but nothing could be stronger on that point than the conduct of the Spanish directors, who had come to a resolution to discontinue, or rather not to begin, the works, and had returned the deposits. The parties had, therefore, incapacitated themselves from going on with the undertaking, by reducing the capital one-third below the amount which was stated to be necessary. A shareholder subscribed his money on the faith that other sums would be subscribed, so as to make up the necessary amount; and the mere act of reducing the capital by one-third, was alone sufficient to bring the Company within the scope of the Act.

An order was then taken, by arrangement between the parties, that the order of the *Vice-Chancellor* should be discharged, upon payment by the Appellants to the Petitioners, of all the sums they had subscribed to the Company, with the costs incurred by them.

Mr. *Bacon*, Mr. *Welford*, and Mr. *Logie*, appeared for one of the Petitioners; and

Mr. *Malins* and Mr. *J. H. Palmer*, for the other.

In re ST. CATHARINE HALL, CAMBRIDGE,
Ex parte GOODWIN.

1848.

Dec. 20th
& 21st.

1849.

Dec. 7th.

THIS was a petition presented to the *Lord Chancellor*, acting on behalf of Her Majesty as Visitor of the College or Hall of *St. Catharine the Virgin*, in the University of *Cambridge*.

It stated the foundation of the College in 1473, by Dr. *Wodelarke*, and the statutes appointed by him for the regulation of the College; by which statutes, as revised by the visitors of King Edward VI, it was (among other things) provided that two of the fellows, at the least, should be priests, and one should be a deacon. And in case either of the fellows in holy orders vacated his fellowship, the next in point of seniority was to take holy orders within one year. By the original statutes of the College, all the fellows were required to be in holy orders.

In February, 1840, the Petitioner, *Charles Wycliffe Goodwin*, Esquire, was admitted a fellow. There were then four other fellows, all in holy orders. In November, 1846, there were four fellows only; and on the 10th of that month, one of the fellows, who was in priest's orders, vacated his fellowship, leaving three fellows (the Petitioner and two other gentlemen), one of whom was in priest's orders and the other was a deacon. At that time, therefore, the requisite number of clerical fellows was not complete.

Where the statutes of a College required a certain number of the fellows to be in holy orders, and directed, that in case the number of clerical fellows became incomplete in consequence of a fellowship being vacated, the next fellow in point of seniority should take holy orders within one year, or *à Collegii emolumentis recedat*: it was held, in the case of a fellow who failed to comply with the statutes, by taking holy orders, that his fellowship had become altogether vacant, and that it was not sufficient for him to give up the emoluments while the number of clerical fellows remained incomplete.

Statement.

On the 1st of April, 1847, the fellow who was in deacon's orders died, and a layman was admitted as a fellow in April, 1847. In October, 1847, another gentleman, who was in deacon's orders, was admitted; so that there were then two fellows in holy orders and two laymen. On the

1848.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.

— — —
Statement.

9th of January, 1848, the lay fellow who was admitted in April, 1847, was ordained deacon, and the fellow who was previously a deacon was ordained priest; so that (excluding the Petitioner) there was then no lay fellow, and the requisite number of clerical fellows was complete.

It was then contended, on the part of the College, that in consequence of the Petitioner not having taken holy orders on or before the 10th of November, 1847, namely, within one year from the time at which there had ceased to be the full number of clerical fellows, and in consequence of the number not being filled up by any of the junior fellows taking holy orders, the fellowship of the Petitioner had become *ipso facto* vacant, and the College refused to allow him to exercise the powers and privileges of a fellow.

This petition was thereupon presented. It prayed a declaration that the Petitioner's fellowship had not become vacant, and that he was entitled to all the privileges of a fellow, excepting only such advantages as were of a lucrative or pecuniarily profitable nature, during the time between the 10th of November, 1847 and the 9th of January, 1848, when the number of fellows, required by the College-statute to be in holy orders, was complete.

The statute in question was in the following terms:—

“III. Item statuimus et ordinamus, quod in dictâ Aulâ præter Magistrum, sint sex Socii, sive plures sive pauciores juxta rationem proventuum et reddituum dictæ domûs. Temporibus vero quibus Socii eligendi sunt, hanc formam subsequentem observari volumus; videlicet, quod Magister et Socii prædicti, habitâ consideratione inter se prius et diligenti examinatione eruditionis et conversationis eorum qui eligendi sunt, communi omnium consensu aut

saltem ex consensu Magistri et majoris partis communitatis, illos in dicti collegii socios eligant, quos eruditione, scientiâ, ac morum honestate maximè abundare crediderint; ita tamen ut iidem intra regnum Angliæ oriundi sint, et in Artibus Magistri aut ad minimum in iisdem baccalaurei idque ex doctioribus qui haberi possint. Eligantur tantum, si commodè fieri potest, Presbyteri aut Diaconi; aut alioqui provideatur ut ex numero Sociorum duo ad minimum sint Presbyteri et unus Diaconus. Si autem aliquis ex illis *discesserit*, senior juxta admissionem eorum qui nondum sunt Presbyteri aut Diaconi, intra unius anni spatium Presbyterum aut Diaconum prout hujus statuti ratio postulaverit se fieri curet, aut alioqui à *Collegii emolumentis recedat*, nisi fuerit aliquis ex junioribus qui in decedentis Presbyteri aut Diaconi locum suâ sponte succedere velit.”

It was insisted, on the part of the Petitioner, that the expression à *Collegii emolumentis recedat*, did not require him to vacate the fellowship, but merely to give up the emoluments arising from it in the interval during which the full number of clerical fellows was incomplete. In support of that argument several of the other statutes of the College were referred to, in which stronger and more distinct language was employed, when it was the clear intention of the founder that the fellowship should be vacated.

One of the statutes referred to for this purpose was to the following effect:—

“VI. *Propter quæ crimina et delicta Socii penitus amoveri debeant.*”

“Item statuimus et ordinamus, quod si aliquis Sociorum dicti Collegii super Hæresi, Simoniâ, Perjurio manifesto, Furto notabili vel super aliis criminibus majore

1848.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.

—
Statement.

1848.

In re
ST. CATHARINE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.

Statement.

ribus publicè per idoneos testes convictus fuerit coram Magistro et Sociis, vel coram eisdem aliquod de præmissis criminibus fuerit confessus ex eo tempore à dicto Collegio et omnibus ejus emolumentis, hujus nostræ ordinationis vigore, sine ullâ aliâ præmonitione ipso facto prorsus exclusus sit et ejectus, absque omni appellationis et juris remedio, nullâ etiam Magistri et Sociorum remissione seu dispensatione in hâc parte omnino valiturâ.”

Another statute (the 8th), after requiring application to be made to the Master for permission for any fellow to absent himself from the University, proceeded as follows:—
 “Si aliquis Sociorum à Collegio ultra sexaginta dies in anno continuos vel interpolatim abfuerit, nisi propter infirmitatem suam ipsius aut parentum vel propter aliquam aliam legitimam et justam causam judicio Magistri aut ejus vicem-gerentis approbandam, ipso facto à collegio sive aulâ prædictâ amotum esse et pro non Socio haberi volumus et statuimus absque appellationis facti vel juris remedio.”

“ IX. *Propter quas alias causas socii à Collegio in totum recedere debeant.*”

“ Statuimus etiam ut si quis Sociorum patrimonium, hæreditatem, aut feodum seculare perpetuum, ultra valorem decem marcarum communibus annis, aut sacerdotium sive beneficium ecclesiasticum habuerit vel assecutus fuerit, is post unum annum completum immediate post hujusmodi patrimonii seu sacerdotii assecutionem et possessionem, à Collegio sive Aulâ prædictâ et emolumentis ejusdem præsentis statuti autoritate recedat, et pro non Socio ex eo tempore habeatur.”

It appeared from the affidavits, which were filed in opposition to the petition, that the construction which had been usually put upon the statutes, was opposed to that

which the Petitioner contended for, and that the practice had been in conformity with the usual interpretation. Three instances were mentioned in confirmation of that statement. On one occasion, as far back as the reign of Queen Elizabeth, a petition had been presented to the Bishop to ordain a fellow, both deacon and minister (a), in order to save his fellowship. The construction which the College put upon the statutes was, that, upon a vacancy being created by any of the clerical fellows, the fellow next in seniority, if not in holy orders, would come under the penalty of entirely and for all purposes forfeiting or vacating his fellowship, unless he should, within one year from the date of such vacancy, proceed to take either priest's or deacon's orders, (according as the vacancy might require a priest or deacon to fill up the whole number of two priests and one deacon,) or unless some fellow junior to him should, within such space of one year, voluntarily, and out of his turn, have taken priest's or deacon's orders, as the case might require.

The statutes of several other colleges were referred to for the purpose of shewing what interpretation was generally put upon expressions similar to those which had given rise to the discussion in the present case.

By a statute of *St. John's College*, it was provided, that in case any fellow obtained a vicarage from the College, "cunctis emolumentis ex Collegio prius debit omnino careat, et privetur ipso facto."

By a statute of *Christ's College*, it was provided, that if any fellow acquired private property of a certain amount,

(a) It was insisted, in argument, that the word "minister" was equivalent to "priest;" and the 32nd canon of 1603 was cited, in which the Bishops were directed not to make any person a deacon and a "minister" on the same day.

1848.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.
—
Statement.

1848.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.
—
Statement.

“nihil de antedictis stipendiis aut cæteris emolumentis recipiet deinceps.”

A similar statute existed at *Pembroke College*, where the expression was “ab emolumentis Collegii recedant.” And by another statute of the last-mentioned College, it was provided, that if there was not the proper number of priests and deacons, the senior fellows must take holy orders, “aut alioqui ab ipsius Collegii emolumentis omnibus recedant.”

In all these cases, the statutes were held to extend to absolute forfeiture of the fellowship, for all purposes.

Argument.

Mr. *Cowling* and Mr. *Malins* appeared in support of the petition; and

Mr. *Bethell* and Mr. *Torriano*, for the College.

1849.

Dec. 7th.

Judgment.

THE LORD CHANCELLOR:—

The argument in support of the petition took a much larger range than the petition warranted. The petition did not dispute that the facts which took place brought this case within the forfeiture described in the third chapter of the statutes, but submitted that such forfeiture did not affect the title to the fellowship, but only the title of the fellow to the profits of it, until the full number of fellows in holy orders should have been made up and completed; but, in argument, it was contended that the facts did not bring the case within the third chapter at all, for that the vacancy provided for was a vacancy by death only, which rested upon the supposition that the words “si autem aliquis ex illis discesserit” meant only if any of them should die, that being, it was contended, the pri-

mary and proper meaning of the word *decedo* or *discedo* when used alone. Such a construction would defeat the obvious object of the founder, which being to keep up the number of clerical fellows to three, of whom one might be only a deacon, he provided for supplying the place of any vacancy amongst such clerical fellows; but if the provision applies only to vacancy by death, the object would fail of being attained in all vacancies arising from other causes. The answer to the argument, however, is, that the primary and proper meaning of the word *decedo* or *discedo*, used alone, is not death, any more than the English word to “depart,” (the primary meaning attributed to the word *discedo* by Ainsworth) means death. It is often used by itself, to express that meaning, as “my departed friend;” but “this life” is in that case understood, though often not expressed, when the meaning is obvious without it. In Ainsworth’s Dictionary, to “die,” is one of eight meanings attributed to the words *decedo* and *discedo*, and is placed seventh in that list; and in the examples given from Cicero, it is not used by itself to express that meaning, “a nobis discessit,” “animum discedere”(a). It appears to me, therefore, that there is no foundation for this argument, and that the petition very properly confined the case to the extent of the forfeiture, and the consequences intended to be attached to it. The word “senior” clearly means seniority amongst the lay fellows, without reference to seniority as between him and the fellow who had held the vacated fellowship.

The only real question is the meaning of the words “à Collegii emolumentis recedat.” Do they mean a forfeiture

(a) This quotation is from the Tusculan Disputations, Lib. I, p. 9: Sunt enim qui discessum animi à corpore putent esse mortem: sunt qui nullum censeant fieri discessum, sed una animum et

corpus occidere, animumque in corpore extingui. Qui *discedere* animum censeant, alii statim dissipari, alii diu permanere, alii semper.

1849.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.

—
Judgment.

1849.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.
 —
Judgment.

of the fellowship, or (as contended by the Petitioner) only of such profit and emolument of it as are of a lucrative or pecuniarily profitable character, until the full number of fellows in holy orders shall have been made up and completed? It is, in the first place, to be observed, that the College asks only for an interpretation of words used, not perhaps according to their most obvious meaning, and therefore attended with some difficulty; but the Petitioner asks not only for a forced interpretation of words used, but the addition of words and provisions not only not to be found in the terms used, but to which it appears to me that there is nothing to lead. Why is the word *recedo* to be construed to mean a temporary and casual retiring from the emoluments of the College? When Horace wrote

“ Senes ut in otia tuta recedant ”(a),

he did not mean to express a *temporary* retirement. So there is no ground for confining the meaning of the word *emolumentum* to such emoluments as are of a lucrative or pecuniarily profitable character, meaning, as it does, any benefit, advantage, consequence, or interest.

But what is there in these expressions used to justify a construction that the forfeiture or loss should continue only until the full number of fellows in holy orders should have been made up and completed? The terms used, implying *per se*, permanency, not only do not justify such a construction but negative it. I am of opinion that it cannot be adopted; and what would be the consequence if it were to be adopted? Clearly, a result adverse to the obvious intention of the founder. He did not confine the College to the election of a new fellow in holy orders, if two priests and one deacon were already fellows, but prescribed a mode of supplying the loss of one of the three by calling upon the senior lay fellow to take holy orders. If he

(a) 1 Sat. 1—31.

obeyed the call, the College might elect a lay fellow, and so they might, if, by refusing to do so, he forfeited his fellowship; but if he might refuse and still retain his fellowship and enjoy all its advantages after the election of the new fellow, who, in that case, must be in holy orders, the College would be deprived of the opportunity of selecting a clerical or a lay fellow, and power would be given to the senior lay fellow of depriving them of their option. Again, the forfeiture or penalty was obviously imposed for the purpose of compelling the senior lay fellow to take holy orders himself, or to provide the means of supplying the deficiency; but how could that be affected by the loss of one year's income to a man determined not to take orders?

Every consideration, therefore, negatives the construction contended for by the Petitioner; but it is true, as I have said, that there is some difficulty in the interpretation of the words, as contended for by the College, although this, perhaps, is not very material, as their construction must prevail if that contended for by the Petitioner must be rejected. This difficulty consists, not so much in the terms used, as in the manner in which the founder has expressed similar intentions in other provisions of the statutes; and the sixth, eighth, and ninth chapters have been referred to for that purpose. In the first two the provision is expressed in terms so different from that now under consideration, that I do not think they can fairly be considered as auxiliary to the interpretation of it. But the ninth is more directly applicable. It provides, that upon any fellow becoming possessed of property, or of an ecclesiastical benefice of certain value, he, after one year "à Collegio sive Aulâ prædictâ et emolumentis ejusdem præsentis statuti autoritate recedat, et pro non Socio ex eo tempore habeatur." And the argument is, that if the forfeiture under the third statute had been intended to be equally extensive, it would have been described by simi-

1849.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.

Judgment.

1849.

In re
ST. CATHAR-
INE HALL,
CAMBRIDGE,
Ex parte
GOODWIN.

—
Judgment.

lar words and expressions. This is certainly an observation entitled to much consideration; and if it had been possible, consistently with the provisions of the founder, and his obvious intention to give to the expressions used in the third statute a meaning different from that which must be given to those used in the ninth, it might have had much weight in deciding between two possible meanings. But I think that this does not occur in this case, and that the only rational construction is to give to both sets of words the same meaning, which is indeed much more amply and clearly expressed in the ninth than in the third, but which is not inconsistent with the words or expressions used in the third, as, indeed, is proved by the words of the ninth statute itself; for the words there used, “à Collegio et emolumentis ejusdem recedat,” shew that in this sentence at least, the words “recedat à Collegii emolumentis,” meant a permanent relinquishment, and not a temporary or casual suspension. The College only asks that the same construction may be given in the third statute, to the same words used in the ninth, as to which the founder has expounded the meaning.

Such would have been the conclusion to which I should have come had I had nothing but the words of the statute before me; but when I find similar words receiving the same construction in other statutes, and of other colleges, and the universally received construction from the earliest time, of such being the true meaning of the expressions used, I cannot but feel fortified in the opinion I have formed, and must therefore hold, that the College have put a right construction upon their statutes, and that this petition must be dismissed.

WOOD v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

1849.

Nov. 2nd & 3rd.

THIS was a motion to discharge an order of the Vice-Chancellor *Knight Bruce*, dated the 8th of May, 1849, whereby it was ordered that an injunction should be awarded to restrain the North Staffordshire Railway Company, their servants, workmen, and agents, until further order, from diverting, obstructing, or interfering with the road and bridge called *Mill Lane* and *Sutton Bridge*, and the Plaintiffs' free use and enjoyment of the same, in any manner contrary to the plan annexed to an award in the pleadings mentioned.

Prior to the passing of a Railway Act, and for the purpose of inducing a landowner to withdraw his opposition to it, an agreement was made between him and the promoters of the Company, by which the amount of compensation to be paid to him, and the approaches to be made to the remainder of his premises, were referred to arbitration. An award was made, under which (among other things) the Company were required to make certain approaches from or near an existing bridge and turnpike-road:—*Held*, that the Company were not thereby precluded from exercising their powers, under the Railways Clauses Consolidation Act, of pulling down the bridge and building another near it, and of making the necessary deviation in the turnpike-road, such deviation being within the limits of the general Act.

The Plaintiffs were owners in fee of some extensive cotton mills and other hereditaments at *Sutton*, in the borough of *Macclesfield*, adjoining a bridge there, called *Sutton Bridge*, on or near to the turnpike road called the *Mill Lane*, leading from *Macclesfield* across *Sutton Bridge*, towards *Langley*. Part of these hereditaments were proposed to be taken for the intended railway, and when the Company had introduced the bills for their incorporation and establishment into Parliament, the Plaintiffs opposed them. In consequence of that opposition, an agreement had been entered into on the 9th of May, 1846, between three of the directors of the proposed Company and the Plaintiffs, to induce them to withdraw their opposition. By that agreement it was provided that the Company should take a certain part of the Plaintiffs' hereditaments at a price to be settled by arbitrators, or an umpire, as therein mentioned; and it then contained the following clause:—"That the said arbitrators, in fixing such price, shall at the same time decide upon suitable approaches to be made by the said Company to the whole of the premises of [the Plaintiffs,] including the brewery, by a good road, on arches, *from or near Sutton Bridge* to the yard, for the purpose of business." Upon the faith of that agree-

1849.

WOOD

v.

THE NORTH
STAFFORD-
SHIRE
RAILWAY Co.

Statement.

ment the Plaintiffs withdrew their opposition, and the Acts were subsequently passed.

Arbitrators and an umpire were duly appointed by a deed executed after the Company were incorporated; and, by the award of the umpire, dated the 31st of December, 1847, the amount of money to be paid by the Company to the Plaintiffs was settled, and the award then required that the Company should make a good road or approach, on arches, *from or near Sutton Bridge* to the Plaintiffs' factory yard, being the yard belonging to the Plaintiffs' cotton mills, for the purposes of business, in the line shewn on a plan annexed to the award; and should also make a good and sufficient road and approach from the *Old Leek Road* to the brewery, in the line also shewn on the plan; such several roads or approaches to be respectively seven yards wide, and to be completed and finished by the Company in a workmanlike manner, and to be made according to the sections shewn on the plan.

It was stated in the bill, and affirmed by the affidavits, that the enjoyment of a free and uninterrupted passage along *Mill Lane* and over *Sutton Bridge*, was of great importance to, and materially enhanced the value of the Plaintiffs' premises, and that the same was taken into consideration by the umpire in making his award, and was shewn by the plans deposited with the Clerk of the Peace, and also in the plan annexed to the agreement of the 9th of May, 1846, and also in the plan annexed to the award; that the Defendants had commenced the formation of a pretended substituted road and bridge at a considerable distance from the old road and bridge, and from the premises of the Plaintiffs, so as to wholly divert the turnpike-road from the Plaintiffs' premises and from *Mill Lane* into another and a different turnpike-road, and in a totally different direction; that the substituted road was not as convenient as the road so threatened to be interfered with,

or as nearly so as might be; and that access to the Plaintiffs' premises would be thereby materially injured and inconvenienced; and that the value of the premises would be materially diminished and prejudiced thereby; and that the Plaintiffs had only recently discovered the intention of the Defendants permanently to obstruct and stop up the said road, and to take down, remove, and permanently destroy the said bridge, without first making a proper and sufficient substituted road.

1849.
 WOOD
 v.
 THE NORTH
 STAFFORD-
 SHIRE
 RAILWAY Co.
 ———
Statement.

This bill was filed in April, 1849, and it prayed for an injunction in the terms in which the order made by the Vice-Chancellor *Knight Bruce* had been drawn up.

The affidavits were conflicting upon the question whether the proposed new road was more or less convenient than the old road.

It appeared that the new bridge was intended to be built very near the site of the old bridge, and that the distance from the Plaintiffs' hereditaments to *Macclesfield* would be increased to the extent of a few yards only.

Mr. *Malins* and Mr. *Dickinson*, for the Company.

Argument.

The question is as to the true construction of the 16th clause of the general or Railways Clauses Consolidation Act. By the 15th sect. of that Act, the Company is allowed to make the present deviation, if it be shewn in the plans deposited with the Clerk of the Peace; and no private contract exists to deprive the Company of the legal right given it by the Act: *Beardmer v. London and North Western Railway Company* (a), *The Feoffees of Heriot's Hospital v. Gibson* (b).

(a) *Ante*, p. 161; *S. C.*, M'N. & Gor. 112.

(b) 2 Dow, 301.

1849.
 ———
 WOOD
 v.
 THE NORTH
 STAFFORD-
 SHIRE
 RAILWAY Co.
 ———
Argument.

The words in the award are “from or near *Sutton Bridge*,” and the 16th clause gives ample compensation to the Plaintiffs, if they be entitled to any compensation, in respect of any damage that may have been sustained by them. The award was made with reference to the Act of Parliament which had then been passed.

The Defendants’ evidence proves that no injury has been sustained by the Plaintiffs; and the *Vice-Chancellor* treated the case, when before him, as merely one of a breach of contract between the parties. The 13th and 14th sections of the Railways Clauses Consolidation Act, which relate to the right of deviation from the engineering works described on the plans, were principally relied on in the argument of the case for the Plaintiffs in the Court below; and the 16th sect. relates to the approaches to the road itself.

Mr. *Rolt*, Mr. *Townsend*, and Mr. *J. Hinde Palmer* for the Plaintiffs.

The Plaintiffs have two grounds of complaint; and the *Vice-Chancellor* having considered one of them, on the breach of contract, established, did not in his judgment deem it necessary to refer to the other. The question is, whether the Company have the power which they claim under the 30th sect. of the special Act (*a*), which

(*a*) (9 & 10 Vict. c. lxxxv.) The 30th sect., relating to *Sutton Bridge*, enacted that the Company should execute at their own expense, to the reasonable satisfaction of the bridge-master of the county of *Chester*, all necessary works for the purpose of strengthening the bridge in the parish of *Prestbury*, so as to enable it to sus-

tain the additional weight which would be occasioned by the Company raising the road leading thereto; and that the Company should make good any damage occasioned to the bridge, or to the county-length of road on each side of it, by the formation of the railway, or any works connected therewith.

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1849.
 WOOD
 v.
 THE NORTH
 STAFFORD-
 SHIRE
 RAILWAY Co.
 —
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(a) 5 T. R. 279.

1849.
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 WOOD
 v.
 THE NORTH
 STAFFORD-
 SHIRE
 RAILWAY CO.
 Judgment.

diversion of roads for the purpose of making railways and accommodation works, and under that sect. the Company would have a right to divert the road in question, unless the 30th sect. of the special Act was restrictive of it; that the works complained of were accommodation works within the 16th sect. of the Railways Clauses Consolidation Act, and it was clearly intended the Company should deal with the turnpike road, and there was nothing in that section inconsistent with the 30th sect. of the special Act, which had in contemplation additional support for the old bridge on account of the increased weight of earth which might be cast upon it, if the line of railway should be in the direction designated in the plans and sections referred to in the special Act. Then came the question as to the decision in the Court below: what was the result of the contract between the parties? It was said, that having regard to the 6th clause of the agreement, the Company could not give the Plaintiffs the benefit of the award: [his Lordship here read the award.] All the award provided for was, that the crossing should be, "from, at, or near *Sutton Bridge* to the Plaintiffs' works;" and the Company were ready to make a good substantial road communicating on arches from or near *Sutton Bridge* to the Plaintiffs' works, and had substantially complied with the terms of the award. His Lordship then observed, that a road having been made by the Company near to *Sutton Bridge*, as was required to be done, the parties complaining, if they had been prejudiced by the manner in which the road had been constructed, had their remedy given them by the Act. As to the spirit of the contract, the Act gave power to the Company to make the road, and injury might possibly accrue to a party in the making of the road, but the manner in which that arose was not material. Here his Lordship again referred to the 16th sect. of the Railways Clauses Consolidation Act, the benefit of which, he was of opinion, had not been contracted away by the

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1849.
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1849.
 WOOD
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 STAFFORD-
 SHIRE
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The Defendants’ evidence proves that no injury has been sustained by the Plaintiffs; and the *Vice-Chancellor* treated the case, when before him, as merely one of a breach of contract between the parties. The 13th and 14th sections of the Railways Clauses Consolidation Act, which relate to the right of deviation from the engineering works described on the plans, were principally relied on in the argument of the case for the Plaintiffs in the Court below; and the 16th sect. relates to the approaches to the road itself.


Mr. *Rolt*, Mr. *Townsend*, and Mr. *J. Hinde Palmer* for the Plaintiffs.

The Plaintiffs have two grounds of complaint; and the *Vice-Chancellor* having considered one of them, on the breach of contract, established, did not in his judgment deem it necessary to refer to the other. The question is, whether the Company have the power which they claim under the 30th sect. of the special Act(*a*), which

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1849.

 WOOD
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1849.

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1849.

 WOOD
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 THE NORTH
 STAFFORD-
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Judgment.

(a) 5 T. R. 279.

1850.
CRADOCK
v.
PIPER.
—
Judgment.

Taxing Master to exercise that discretion. I was desirous of ascertaining how that matter stood—not only how it stood as existing after that decision of the Vice-Chancellor *Knight Bruce*, but how it was understood as existing prior to that decision; and for that purpose it was necessary to resort, not to the present Taxing Masters, whose experience as Taxing Masters was very nearly coeval with that decision, but how it was understood by the Masters in Ordinary, upon whom that duty devolved prior to that decision. I therefore referred to those Masters who were Masters anterior to the time when that case came before the Vice-Chancellor *Knight Bruce*, and I have received this certificate from the senior Master, the Master not only whose experience, but whose attention to the business of the Court, is always mentioned as entitling him to the highest consideration, I mean Master *Dowdewell*:—"Under the common order for taxation of costs as between solicitor and client, it was my practice, and I believe it was the practice of the other Masters, to disallow all costs to a solicitor who was also a trustee, except costs out of pocket, in all cases in which an objection was taken that no other costs ought to be allowed; and that, without any special order as to the allowance or disallowance of any such costs." I also have the same opinion communicated to me from Master *Farrer*, and from Master *Brougham*, those being the three Masters, without any or certainly with very few exceptions, who had experience in the mode of taxing costs before that duty was transferred from their office to that of the Taxing Masters. That, coupled with the acknowledged practice of the Taxing Masters, which I have also ascertained, leaves no doubt on my mind that my first impression was not correct, although there certainly is a little difficulty in reconciling the form of the order with the practice which seems to be established as the proper and legitimate exercise of the discretion vested in the Taxing Masters; and consequently,

that part of the case which is founded upon the supposed excess of power exercised by the Taxing Master, fails.

The question remains to be considered, whether the Taxing Master, in the exercise of that jurisdiction, has come to a right conclusion. Now, as to the costs of a trustee himself, where he is a party to a cause as trustee, and also acts as solicitor for himself, there can, I think, be no doubt that the Master exercised a proper discretion in disallowing all costs. The *Vice-Chancellor of England*, however, was of opinion, that that did not apply to the present case, upon the ground that these suits having been many years pending, the costs had been by a former order directed to be taxed, and no objection was then made, nor was the attention either of the Court or of the Master called to the fact that the trustee was also a solicitor, and that he was acting as solicitor for himself as trustee. That distinction had not been taken, and the costs had been taxed as between solicitor and client, without regard to the objection that he was a trustee, and, therefore, was having his own costs. Then the order upon which the present costs were ordered to be taxed, takes that up as a sum fixed, and directs the taxation of the subsequent costs; but still, there is nothing in the last order directing the Master to allow costs other than costs out of pocket; and I cannot understand very well how the fact that an error had been committed on a prior taxation of costs is to lead to the conclusion that the Court intended that that error should be continued and acted upon in the subsequent taxation. I think, therefore, that under that order all that the Taxing Master had to do was to see what that order was, and that order was to tax costs as between solicitor and client. He was to perform his ordinary duty as a Taxing Master in the execution of that order, and, no special direction being communicated to him, he was only to look at the order under which he

1850.

CRADOCK

v.

PIPER.

Judgment.

1850.
 CRADOCK
 v.
 PIPER.
 Judgment.

was acting, and see what was the exposition of that order; therefore, I think he had a duty to perform just as if the reference to him had been in the first instance to tax costs as between solicitor and client. Then he has disallowed all those costs, as to which, I have no doubt, he was quite right.

But then it was contended that a trustee, having acted as solicitor for other parties, Defendants in some of the suits and Plaintiffs in others, cannot be entitled to any costs beyond costs out of pocket in respect of such employment. It may well be supposed that the security against abuse would be effective, if the rule were to apply to such cases. A trustee being also a solicitor is very likely to be intrusted with the exclusive management of the trust property, and he may, therefore, have a discretionary power as to the institution and framing and management of suits; and that discretion is too likely to be influenced by the profits which may arise to him in respect of the costs of other parties for whom he may act as well as his own. But, on the other hand, any such rule might easily be evaded, for a name is easily borrowed, and practically the supposed security is not very effectual. I think, however, we should ascertain whether the rule has been so extended, rather than consider what advantages might be supposed immediately to accrue from it. Now the rule has been supposed to be founded upon the well-known principle that a trustee cannot be permitted to make a profit of his office, which he would do, if he, being a party to a cause as trustee, was permitted, being also a solicitor, to derive professional profit from acting for himself as such party. In *New v. Jones* (a) the question arose on business done by a trustee as a solicitor, and it was held, that he could not charge for such business as a solicitor. In *Moore v. Fraud* (b)

(a) 9 Byth. Conv. 731. And see *post*, p. 632.

(b) 3 My. & Cr. 50. See *Moore v. Fraud*.

1850.
 CRADOCK
 v.
 PIPER.
 Judgment.

the business and employment, in respect of which costs were claimed, were the proper business and employment of a trustee, and that is so understood. The case is clear, from the expressions I then used, which were these:—
 “It is clear, that if an attorney be allowed to make profit, by means of professional business, of his office of trustee, it will constitute an exception to a rule well known and established in all other cases. A factor acting as executor is not so entitled, nor a commission agent.” The case of *Carmichael v. Wilson* (a) has been supposed to be an authority founded upon an opinion of Lord *Eldon* against the existence of the rule depriving the solicitor of his costs, except costs out of pocket, when acting for himself as trustee. But it is clear from a report of the case in another stage (b), that the report in *Molloy* cannot be relied upon. The decision is stated to have been made in December, 1825, upon exceptions to the Master’s report; but from the report in *Dow & Clark* it appears that no such questions could then have been decided. An executor, being a solicitor, had instituted several suits on account of the testator’s estate, and upon an application by the legatees against him, the Master was directed to inquire as to the institution and proper conduct of such suits, and to tax the executor’s costs, but without prejudice to the question whether an executor was entitled to have such costs beyond costs out of pocket,—a reservation which shews that at that time the rule, which is supposed to originate in *New v. Jones*, before Lord *Eyndhurst*, was not by any means unknown. The existence of it was recognised by that order of the *Chancellor of Ireland*, Lord *Manners*, who ordered the costs to be taxed without prejudice to the question whether the party was or not entitled to those costs, being trustee as well as solicitor. On that reference the Master made a report, stating the objections as to the

(a) 2 Moll. 537.

(b) 2 D. & C. 51.

1850.

CRADOCK

v.

PIPER.

Judgment.

conduct of the causes, and suggesting that as such suits were still pending, and the result uncertain, it would be proper to postpone the consideration of the executor's costs until the result of such suits should be ascertained. To this report the executors excepted, and their exceptions were heard on the 6th of December, 1825, and were then overruled. That is the hearing reported in *Molloy*; but the only decision was, whether the claim for costs should be postponed, and not as to the mode in which they should be taxed. This also is a case in which the costs in question were the proper costs of the parties. So far, therefore, as the rule laid down and acted upon is confirmed, it is confined to cases in which the business and employment of the solicitor is the proper business and employment of the trustee. But it is no part of the business or employment of a trustee to assist other parties in suits relative to the trust property. If, therefore, a trustee acts as solicitor for other parties, such business and employment is not in the business or employment of the trustee, and the rule as hitherto laid down would not apply; and hitherto no case has arisen raising the question, whether the rule ought to be extended to the costs of such other parties for whom the trustee had acted as solicitor.

But, in the case of *Fraser v. Palmer* (a), the distinction was taken, and, I think, properly decided. In that case—which, unfortunately, upon this point is not very precise, but, I think, precise enough for the present purpose,—it appears that there were three suits. In the first, the solicitor's name was *Harmer*, and he was trustee of a separate fund which the wife was entitled to for life. The first suit was *Fraser v. Palmer*, *Palmer* being the name of the husband and wife, who were *cestuis que trust* of the fund of which *Harmer* was the trustee, and

(a) 4 Y. & C. 517.

that suit was instituted by *Fraser*, as creditor of Mrs. *Palmer*, against Mr. and Mrs. *Palmer*, to enforce payment of his debt out of her separate estate. *Harmer* was not a party to that suit, but he acted for the *cestui que trust*. He was solicitor for Mrs. *Palmer*, who was beneficially entitled. He was, therefore, trustee of the fund in question, and he acted as solicitor for the *cestui que trust*. Mr. Baron *Alderson*, who was sitting in Equity, was of opinion that, as such, he was entitled to his costs in that suit. That is exactly the very point here: a trustee of a fund acting as solicitor for his *cestui que trust*. He is not performing any part of his duty as trustee in that transaction at all. He happened to be trustee, and, being a solicitor, he was employed by the *cestui que trust* to appear for her, and act for her in the suit. Mr. Baron *Alderson* considered that that was not within the rule, and allowed him his costs of that suit. In the other two suits, the trustee himself was a party. In the second, that is *Palmer v. Fraser*, a bill, in the nature of a bill of interpleader, was filed by Mr. *Palmer* against Mr. *Harmer* and Mrs. *Palmer*, that is, against the *cestui que trust* and trustee, praying for the directions of the Court concerning the annuity. To this bill Mr. *Harmer* and Mrs. *Palmer* severally demurred, and their demurrers severally were allowed. The last was an action in which the trustee himself was Plaintiff; therefore, in the second suit, properly speaking, he was Defendant. In the third suit, which was an action at law, he was the Plaintiff himself. The Master disallowed the whole costs; and Mr. Baron *Alderson* says, "I think the Master was wrong as to the first suit, and right as to the others. In the first suit, *Harmer* was not acting in the character of trustee, though he was Mrs. *Palmer's* solicitor. As to the other matters, he is clearly not to be allowed more than his costs out of pocket. The principle is, that the estate is to be protected by the unbiassed judgment of the trustee." Then he goes on and argues as to the pro-

1850.
 CRADOCK
 v.
 PIPER.
 Judgment.

1850.

CRADOCK

v.

PIPER.

Judgment.

priety and policy of the rule. The only part of this case which is effective for the present purpose is as to the suit in which *Mrs. Palmer* and *Harmer* were Defendants, in which he appears to have acted for both. The distinction is not taken. From the language used by the learned Judge in disposing of the case, it would certainly appear as if he had disallowed all the costs in that suit. Whether it was so or not, or whether he was disallowed only his own costs, is not very clearly stated; nor does it appear from the judgment, except so far as it seems to follow from what was done in the first suit, that he ought not to have been allowed, at least in the same proportion, the costs of acting for *Mrs. Palmer*, he having been allowed the costs of acting for *Mrs. Palmer* in the first suit. However, for the present purpose this is clear, from the decision of the learned Judge, that, in a case in which a solicitor, being trustee of the fund in question, acts for the *cestui que trust*, not acting for himself purely, but for the *cestui que trust*, the fact of his being trustee of the fund in question, does not prevent him obtaining costs as solicitor of the *cestui que trust*. That is established by the first suit, and clearly pointed out by the judgment. It also points out,—and that is not a matter in dispute or a matter of doubt with me,—that where he acts for himself, he himself being a party, he cannot be allowed his costs. That falls within all the former cases. There is no case that I can find in which the principle has been extended beyond the dealing of a trustee for himself, and acting for himself as solicitor in the execution of those trusts. It is not extended to a case where the mere circumstance of being a trustee and solicitor, but not performing the duty as a trustee, he is within the rule that he is not entitled to his costs, though acting as trustee for other parties.

On that state of authority, and upon the principle of the rule itself, and the absence of authority to the contrary, I

am of opinion that the Master here has very properly dis-
allowed all costs incurred by *Watson* on behalf of himself
acting for himself; but that he is entitled to the ordinary
costs where he acts for others as solicitor.

1850.

CRADOCK
v.
PIPER.

Judgment.

The case having been thus disposed of, so far as related
to the costs of the trustee, where he acted in the character
of solicitor for his co-trustees or *cestuis que trust*, the case
was mentioned again as to the mode of taxation which was
to be adopted where he had acted as solicitor for himself
and his co-trustees jointly, or for himself and his co-trus-
tees and his wife jointly, his wife being one of the parties
beneficially interested under the testator's will.

Statement.

Upon an examination of the bills of costs, it was ascer-
tained that they had not been increased by the solicitor
being one of the parties for whom the joint appearance had
been made.

The question was put in the following manner:—If *Wat-
son* made out one set of costs for himself, his three co-trus-
tees, and his wife jointly—those costs not being increased
by his being one of the parties for whom he was acting as
solicitor—ought one-fifth of those costs, beyond the costs
out of pocket, to be disallowed?

The LORD CHANCELLOR:—

Jan. 22nd.

All I have already decided was simply that I thought
the *Vice-Chancellor* had not taken a right view of the case
in giving *Watson* the full costs; and I thought, therefore,
that, so far as the solicitor, being trustee, had costs of his
own, under the rule, which is now well established, he
ought only to have the costs out of pocket. But I thought

Judgment.

1850.

CRADOCK

v.

PIPER.

Judgment.

that where he acted for the others it was no longer an acting in the character of trustee, and that he was not precluded from acting in the character of solicitor, though he was trustee of the fund.

Those two points I decided. The question was, what was to be done in carrying out those principles where there was a joint appearance? The facts were not before me, and that was reserved for inquiry, and for the purpose of seeing how that matter stood. Now the question is, as it appears that there was a joint appearing for the trustee himself, and others his co-trustees, and his wife, who was a *cestui que trust*, what the proper effect of those rules is to be upon this state of circumstances. Suppose there are four persons who appear jointly, and one is disallowed his costs or not allowed his costs, and the other three are; unless the Master in taxing separated the costs of one from the other, he would not carry out the order of the Court; because they would all get their costs just as if the Court had not made the distinction. Say 40*l.* is the sum, and the solicitor claims his costs of those parties; if the Master disallows a fourth part, because one was not allowed his costs, the solicitor only gets 30*l.* instead of 40*l.* If on the other hand, he does not make that distinction, he gives 40*l.* equally, whether the party acted or not. That would not be carrying out the intention of the Court. The matter for consideration is, in what way the intention of the Court and the principle of the rule is to be carried out in taxing costs. I find a certain sum of money claimed for costs of certain parties, of whom the trustee is one, and the principle I have laid down is, that the solicitor is to be entitled to his costs as an ordinary solicitor in respect of parties for whom he appears unconnected with himself, that is independent of the costs incurred by himself as trustee. Now if that apportionment of the costs was made in that case, it destroys the rule of the Court, because

then the solicitor does not get the costs of the party for whom he appears, inasmuch as the costs of those parties are not at all increased by his being one of them. Take the same sum as I gave before; say 40*l.* are the costs of the whole: the same 40*l.* would be incurred as the costs of the three. I assume that there is also a joint appearance, and no extra costs occasioned by the party being himself one of the Defendants. If 40*l.* be the sum, which, if he did not appear for himself, he would be entitled to receive, how, consistently with the principles I have laid down, can I say that he is only to have 30*l.*? That is the effect of it; I only presume that is the amount. It seems to me that the unavoidable result of the rule which I have laid down is, that the costs of the parties for whom he appeared, and whom he had a right to appear for, and for which appearance, according to the rule I have laid down, he has a right to receive full costs, ought not to be diminished by the circumstance of his being a party associated with other parties, and that association not increasing the costs of the client. I think, therefore, that in taxing the costs of the parties, where he is one, he must be allowed the costs as if he was not a party himself.

1850.
 CRADOCK
 v.
 PIPER.
 Judgment.

I assume now, upon looking into the bill of costs, that there is not any portion of the bill in which costs have been occasioned by his appearing for himself, independently of his appearing for other parties.

With regard to the question of costs of the appeal, it would come to this: If an order pronounced by any of the other Courts, is afterwards brought before me, and my opinion is that it is right, am I to dispose of the costs because the reason given by the Court below is not exactly that which I think ought to be acted upon? It would be a very inconvenient discussion, and I do not think it would be right in principle. Although a party may have succeeded

1850.

CRADOCK
v.
PIPER.

—
Judgment.

below upon grounds which are not satisfactory to me, yet a party appealing may go a little further, and see whether, upon any grounds, he can support or reject the order which has been made.

A party knows how his bill is taxed: he disputes the mode in which the taxation is made under the order directed by the *Vice-Chancellor*; the bill is properly taxed according to the decree of the *Vice-Chancellor*; but the reason may not be the same in my view as in that of the *Vice-Chancellor*. A party comes here on appeal; he complains, not of the reason given by the *Vice-Chancellor*, but of the act that is done by the Court below. The Court has done no mischief, at least done no mischief according to my view of the case. If the Court were to look at the reasons, I should think the Appellants were protected from the costs: but I do not look at the reasons, I look to the substance; I look to what they have come to correct. As I find nothing to correct, I think they must pay the costs of coming here.

The Reporters are indebted to Mr. *Finnelly* for the following note of *New v. Jones*, which was re-

ported in the *Legal Observer* for 1833, p. 410.

1833.

August 8th.

A solicitor, who accepts a trust under a will or settlement, is not entitled to charge for work and labour done by him as a solicitor, in executing the trust.

NEW v. JONES.

COURT OF EQUITY EXCHEQUER.

THE question raised, and now decided in this case, was, whether a trustee or executor, who was a solicitor, was entitled to charge for business done in the trust as a solicitor.

In the first argument on these points, the case of *Turner v. Hill*, lately decided by the Chief Baron, but not reported, was cited against the solicitor's right to charge; and the cases of *Baker v. Grosvenor*, (cited from MS. notes of Mr. *Lovat*), and *Carmichael v. Willson* (a), decided in the House of Lords, were cited on the other side.

(a) 4 Bligh, (N.S.), 145.

The questions having again come on for further argument on a succeeding day,

The LORD CHIEF BARON [Lord *Lyndhurst*] observed, that it was the duty of a trustee to watch over the solicitor in all proceedings connected with the trust, and to take care that he did only that which was proper, and that his charges were not unreasonable; he was also bound to tax the costs of the solicitor, if necessary. The trustee being appointed for this duty, the question was, whether a Court of Equity would allow a trustee, acting as a solicitor to the trust estate, his charges for work and labour in that capacity.

Mr. *Lovat* said there had lately been two cases of this nature decided in the Court of Chancery, the first of which came on before Sir *W. Grant*, and was this: A gentleman of the name of *Grosvenor*, who was a partner in the house of *Wadson, Barlow, & Grosvenor*, solicitors, was appointed a trustee under a deed, which created a trust to sell a certain estate to pay an auctioneer a sum of money owing to him by the gentleman executing the deed, and the expenses of the conveyance. The house in which Mr. *Grosvenor* was a partner transacted the business as solicitors for the trust. The case came on before Sir *W. Grant*, and it was then contended, that, on the principles of public policy, they could not charge for business so transacted, inasmuch as Mr. *Grosvenor* was a partner in the house; for that, if a trustee so circumstanced was permitted to act, there would be no security for the trust. Sir *W. Grant* said that he knew of no authority in which it was ever held that, if a trustee, being a solicitor, transacted matters of business in respect of which it was necessary to employ a solicitor, he might not be allowed such charges, unless it was shown that they were improperly made. In consequence of that, Mr. *Grosvenor* was allowed his charges in respect of the business transacted by the house in which he was a partner. There was another case of this nature that came before the *Vice-Chancellor* about ten days since; it was that of *Daniel v. Goldson* (not reported), in which the Defendant was a trustee under a will, which directed the estates to be sold; he was also a solicitor, and acted as such in all those matters of business in which it was necessary to employ a solicitor; he made up his accounts, and those charges were disallowed. It was contended by Sir *E. Sugden*, for the solicitor, that the Master, in taking the accounts, had not allowed the sums charged by this gentleman with respect to business so transacted; in consequence of which they came into Court to have the minutes corrected by introducing other words for the allowance of such charges, when Mr. *Lynch*, who was for the *cestui que trust*, opposed the alteration, and stated that the object of it was to get an allowance in respect of business which was transacted by the trustee in character of a solicitor, which, upon principles of public policy, he could not obtain,

1833.
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 NEW
 v.
 JONES.
 —
 Argument.

1833.

NEW
v.
JONES.

Argument.

inasmuch as it was the duty of the trustee to watch over the solicitor. The *Vice-Chancellor* said he was not aware of anything which prevented a trustee, being a solicitor, from being paid for business done by him in that character, if it was necessary for a solicitor to be employed, and his charges were such as would be proper if the business had been done by another solicitor.

Mr. *Duckworth* said it was of great importance that the point should be decided. It was the general impression among the members of the profession, that in such cases a solicitor was not allowed to charge for business done by him.

The LORD CHIEF BARON.—A trustee, generally, is not allowed to make any charge for his labour in the execution of the trust; he might, if he did not like the office, decline it; but if he accept it, the law of this Court, and, indeed, public policy, prohibits him from making any advantage of it. That being the law generally, the question now is, whether a trustee, being a solicitor, can charge for his labour as such, in exception to the general rule.

His Lordship having taken time to look into the cases, delivered the following judgment on a subsequent day:—

Judgment.

The sole question to be decided is, whether or not a solicitor, who was an executor or trustee, is entitled to be paid his bill of costs for business done by him as a solicitor in the execution of his trust. There is no point more clearly established as a general rule, by the case of *Robinson v. Pett (a)*, and other decisions, than that an executor or trustee is not entitled to be paid for his trouble. If the accounts of the deceased are complicated, and the executor takes upon himself to settle and arrange those accounts, although it may take up much of his time and attention, the principle of equity is, that he is not entitled to compensation for his time and trouble; if he chooses to employ an accountant to settle these accounts, for the expenses so occasioned he is entitled to be remunerated out of the estate. The principle is this: it is the duty of an executor and a trustee to be the guardian of an estate, and to watch over the interests of the estate committed to his charge. If he be allowed to perform the duties connected with the estate, and to claim compensation for his services, his interest would then be opposed to his duty, and, as a matter of prudence, the Court does not allow the executor or trustee to place himself in that situation. If he chooses

(a) 3 P. Wms. 249.

to perform those duties or services on that estate, he is not entitled to receive compensation. The case applies as strongly to an attorney as to that of any other person; for if an attorney, who is an executor, performs business that was necessary to be transacted,—if this attorney, being an executor, performs those duties himself, he, in my opinion, is not entitled to be paid for the performance of those duties; it would be placing his interests at variance with the duties he has to discharge. It was said that the bill might be taxed, and that this would be a sufficient check. I am of opinion that it would not; the estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor, in addition to the check of the taxing officer. There might be cases (I do not speak with reference to the present case) where a trustee, placed in the situation of a solicitor, might, if he were allowed to perform the duties of a solicitor, and to be paid for them, be so placed that he might find it very often proper to institute and carry on legal proceedings which he would not do were he to derive no emolument from them, and were to employ another person. In point of prudence and propriety, and as a guard over the estate, I am of opinion that it would not be proper that a solicitor, who is a trustee, should be distinguished from an ordinary trustee. If a trustee, who is a solicitor, acts as a solicitor, he is not entitled to charge for his labour; he is entitled only to be paid his costs out of pocket. This rule applies to the present case.

1833.
NEW
v.
JONES.
Judgment.

In re GAFFEE'S SETTLEMENT.

THIS was an appeal from the decision of the Vice-Chancellor *Wigram*, which is reported in 7 Hare, 101.

Hannah Poole, while under age, intermarried with *Benjamin Gaffee*, and no settlement or agreement for a settlement was then made. After the marriage, it was, however,

time appoint, not by way of anticipation; and, in default of appointment, to the wife for her separate use, independent of *G.* her husband; and from and after her death, to *G.* the husband, for life; and from and after the death of the survivor, to the children of the marriage, as therein mentioned; and, if there should be no children, and the wife should survive *G.* the husband, the whole trust property to be paid to her; and if *G.* the husband should survive the wife, then, at his death, as the wife should appoint, or, if no appointment, to her next of kin:—*Held*, that, although no reference was made in the settlement to any future coverture, still the trust for the separate use of the wife, and the clause against anticipation, protected the interest of the wife during a second marriage, and that a charge by her and her second husband upon her life interest in the trust property, was invalid.

1849.
May 4th & 5th.
1850.
Feb. 26th.
By a post-nuptial settlement a sum of money, the property of the wife, was vested in trustees, upon trust to pay the income as the wife should from time to

1849.
 ———
In re
GAFFEE'S
SETTLEMENT.
 ———
Statement.

agreed, that part of her property should be paid to her husband, and that the remainder should be settled. A settlement was accordingly executed, dated the 29th of May, 1811, and made between *Benjamin Gaffee* and his wife, of the first part, and trustees, of the second part, whereby the trustees were directed (a) to pay the income of the trust property "to such persons and for such purposes as the said *Hannah Gaffee* should from time to time, by any writing under her hand, direct or appoint, but not so as to dispose of the same by sale, mortgage, or charge, or otherwise in the way of anticipation; and in default of such direction or appointment, into her own hands, for her own separate use, notwithstanding her coverture, independently of the said *Benjamin Gaffee*, who was not to intermeddle therewith, neither was the same to be subject to his debts, contracts, or engagements; and the receipts of the said *Hannah Gaffee*, and of her appointees, were thereby declared to be discharges for the same; and from and after the decease of *Hannah Gaffee*, to pay the interest, dividends, and annual produce of the same trust monies and premises, or permit the same to be received by the said *Benjamin Gaffee* and his assigns, during his natural life; and after the decease of the survivor of them, if there should be issue of their bodies, any child or children," in trust for the benefit of the children; and if there should be no child who should become entitled, then upon trust, if *Benjamin Gaffee* died in the lifetime of his wife, to transfer the trust funds to *Hannah Gaffee*, absolutely, but if he survived her, then to pay them as she should appoint by deed or will, and in default of appointment, to the parties who would be entitled to her personal estate in case she died intestate and unmarried.

(a) No definite time, as the life of Mrs. *Gaffee*, or the continuance of the coverture, was speci-

fied for the performance of this direction.

In 1818, *Benjamin Gaffee* died, leaving several children of the marriage; and *Mrs. Gaffee* afterwards married a second husband, *Adam Browne*. After her second marriage she and her husband executed some annuity deeds, by which the annuities were charged upon her interest in the trust property; and the question which was now raised was, whether the annuities were effectually charged on her life estate, or whether the clause in the settlement, against anticipation, extended to her second marriage, and precluded her from making such a charge.

1849.
 In re
 GAFFEE'S
 SETTLEMENT.
 ———
Statement.

The trust property had been brought into Court by the trustees, under the Trustee Act, 10 & 11 Vict. c. 96; and she had presented a petition, praying for the payment of the dividends to her.

The Vice-Chancellor *Wigram*, without expressing any positive opinion that the settlement was intended by the parties to apply to the then existing coverture only, decided, on the authority of *Knight v. Knight* (a), *Benson v. Benson* (b), and *Bradley v. Hughes* (c), that the disposition of the property after the second marriage was valid.

Mrs. Browne appealed from this decision.

Mr. *Wood* and Mr. *Parsons*, for the Appellant.

Mrs. Gaffee's power of appointment was commensurate with her life interest; and although, on the authority of *Barton v. Briscoe* (d), she might, while she was discovert, have made any disposition she pleased of her life interest in the property, still, when she married again, the trust in her favour, with the restraint upon anticipation,

Argument.

(a) 6 Sim. 121.
 (b) Id. 126.

(c) 8 Sim. 149.
 (d) Jac. 603.

1849.

In re
GAFFEE'S
SETTLEMENT.

—
Argument.

was revived. The first trust was general, and extended during the life of the wife; it was, however, contended, that the separate use clause, and the anticipation clause, were intended to protect the wife against *Benjamin Gaffee* only, and could not be extended to a future husband. But the clause against anticipation was in general terms; and in *Brown v. Bamford* (a) the Court referred to the clause against anticipation, to enable it to put a proper construction on the separate use clause. In a settlement made in contemplation of a particular marriage, that marriage is more especially in the consideration of the parties. But this settlement was made after marriage, and the object of it was to secure the most effectual protection for the wife, in the manner most beneficial for her. The trust for her benefit was to continue for her life, and not merely during the then existing coverture, and therefore the clause for her separate use and against anticipation must be reasonably supposed to be intended to be of the same duration: *Knight v. Knight* (b), *Benson v. Benson* (c), *Bradley v. Hughes* (d).

The *Solicitor-General* and Mr. *Bacon* appeared for the annuitants, in support of the order.

In this settlement nothing is said about the “present or any future coverture:” the first trust directs the payment to the wife, without fixing any duration for that trust. It does not give her an interest for her life, or during the coverture, but is left altogether indefinite. But the separate interest of the wife is directed to be independent of *Benjamin Gaffee*,—not of her present, or any future husband,—and the children who were to be ultimately benefited were not the children of Mrs. *Gaffee* by any husband, but the children of that existing marriage.

(a) 1 Ph. 620.

(b) 6 Sim. 121.

(c) 6 Sim. 126.

(d) 8 Id. 149.

The general scope of the settlement must be taken to be to protect Mrs. *Gaffee* against the then existing coverture, and to provide for the children of that marriage. In the cases which were cited, there was a reference to future coverture: *Tullett v. Armstrong* (a).

1849.
In re
GAFFEE'S
SETTLEMENT.
Argument.

Mr. *Walker* and Mr. *Blundell* appeared for the trustees.

Mr. *Wood* replied.

The LORD CHANCELLOR, (after stating the trusts of the settlement on which the question arose—the death of *Gaffee*—the second marriage of the widow—and the assignment by her and her second husband,) said:—

1850.
Feb. 26th.
Judgment.

The question is, whether the assignment by the second husband and wife is good. Now, Vice-Chancellor *Wigram* in his judgment in this case did not give a decided opinion as to the construction of the settlement, but thought himself bound by the cases of *Knight v. Knight* (b), *Benson v. Benson* (c), and *Bradley v. Hughes* (d). With respect to these three cases, the first was decided in 1834, the second in 1835, and the third in 1836. At those respective dates the rule of this Court was supposed to be settled by the cases referred to before me, in *Tullett v. Armstrong* (a), that a provision for separate use and against anticipation would be inoperative under a second marriage, even although a second marriage had been contemplated and attempted to be provided for by the author of the trust, as in *Malcolm v. O'Callaghan* (e). Under such a supposed state of the law,

(a) 4 My. & Cr. 390—400.

(b) 6 Sim. 121.

(c) Id. 126.

(d) 8 Sim. 149.

(e) 5 L. J. Rep., (N. S.), Chanc., 137.

1850.
 In re
 GAFFEN'S
 SETTLEMENT.
 —
 Judgment.

those decisions, which I have referred to, were the necessary consequence; for, if the provision for the separate use and against anticipation could not be made operative in the case of a second marriage, it could not be material whether or not the parties had expressed such intention in the settlement.

But now, taking the rule to be as laid down in *Tullett v. Armstrong* (a), that these fetters will protect the property of the wife during the second coverture, provided nothing has been done by her while discoverd to remove them, the only question will be, whether this settlement is so framed as to include the period of the second coverture. It must be observed, that, of these cases so decided by the *Vice-Chancellor of England*, in the first, *Knight v. Knight* (b), there was a distinct gift for life to the separate use and without power of anticipation: but the *Vice-Chancellor*, after referring to *Newton v. Reid* (c) and *Woodmeston v. Walker* (d), held, that the restriction was only binding during the life of the first husband, and not beyond it. So in *Benson v. Benson* (e) there was a distinct estate for life, but the provision for separate use and against anticipation appeared to be applied to the existing coverture. *Bradley v. Hughes* (f) in its circumstances much resembled the present case, there being no gift for life, except in the direction to pay to the separate use: and the *Vice-Chancellor* held the assignee of the second husband, under the Insolvent Act, entitled on the principle supposed to be established in *Woodmeston v. Walker* (d) and *Brown v. Pocock* (g), namely, that property given to the separate use (these are the words of the *Vice-Chancellor*) of a married woman would operate as a restriction on her alienating it during the coverture, but not after-

(a) 4 My. & Cr. 390.

(b) 6 Sim. 121.

(c) 4 Id. 141.

(d) 2 Russ. & My. 197.

(e) 6 Sim. 126.

(f) 8 Id. 149—151.

(g) 2 Russ. & My. 210

wards: so that after the death of the first husband it was a trust for her, and then the marital right of her second husband intervened, and his assignee was entitled to the annuity.

1850.
 In re
 GAFFEE'S
 SETTLEMENT.
 Judgment.

As those cases, therefore, proceeded upon a supposed rule of equity, which does not now exist, and as it is now settled that a gift to the separate use without power of anticipation will operate on all the covertures of a woman, unless those provisions are destroyed while she is discovert, those decisions cannot be considered applicable to the present case, which must depend on the construction to be put on the words used, namely, whether the provisions for the separate use and against anticipation are applicable to the whole of the life estate given, or only during the then existing coverture.

For this purpose, the first observation that arises is, that there is no gift but in the direction to pay, and the direction is, to pay upon the wife's appointment in writing, but not by way of anticipation, and, in default of appointment, into her own hands for her separate use. This provision, standing by itself, would give to the wife the security of the separate estate, according to *Tullett v. Armstrong*, and *Scarborough v. Borman* (a); but these words are added, "notwithstanding her coverture, independently of the said *Benjamin Gaffee*, who is not to intermeddle therewith, neither is the same to be subject to his debts, contracts, or engagements; and the receipts of her the said *Hannah Gaffee*, and of her appointees, are hereby declared to be discharges for the same." These latter words obviously apply to the then existing coverture; but the parties clearly intended that the wife should have an estate for life. The possibility of her surviving her husband does not appear to have been contemplated; but that would

(a) 4 My. & Cr. 377.

1850.

In re
GAFFEE'S
SETTLEMENT.

—
Judgment.

not of itself affect the construction of the first part of the gift, if that be sufficient to give her an estate for life. It is, in the first place, to be observed, that the words are inoperative, so far as relates to the then existing coverture; for *Benjamin Gaffee* and his creditors would have been effectually excluded by the earlier words, although there had not been that expression here. Can any higher effect be given to those latter words than to shew that the parties had contemplated only the existing coverture, and had no purpose present to their thoughts relative to any future coverture? If the absence of such thoughts would not of itself affect the construction of the gift, can these words have that effect, as they only prove that such thoughts were absent from their minds? What the annuitants are claiming is the absolute life estate of the wife, as having become the property of the husband by marriage. But there is no creation of any such life estate by the settlement; by which the trustees are only authorised to pay the dividends as they shall accrue due, without anticipation, to the appointees of the wife, or into her own hands. The joint execution of the annuity deed by the husband and wife cannot be an appointment under this power. The decision which is appealed from leaves the trustees to pay the dividends in a manner which is not authorised by the terms of the trust, but is in direct opposition to them; for the deeds are grants of anticipated interest, and the discharge for the payments cannot be given by the wife or her appointees. The construction adopted can only be supported on the supposition that, taking the whole of the provision together, the generality of the earlier parts of it is restricted and confined, by the reference to *Benjamin Gaffee* and his debts, to the then existing coverture; but, if so, the whole provision must be so restricted, and in that case the direction to pay the dividends to the wife or her appointees must be read with the same restriction, the provision as to anticipation of the income being part of the

direction to pay. So that, after the death of *Benjamin Gaffee*, the direction to the trustees to pay the dividends to the wife would cease.

1850.
 —————
In re
GAFFEE'S
SETTLEMENT.
 —————
Judgment.

The construction contended for assumes that the words used mean, first, an estate for life to the wife, and, secondly, a trust, during the life of the then husband, for her separate use, and without anticipation; but I find no words giving any unqualified life estate. If the restriction forms part of the only sentence which gives any estate, and is in words made part of such gift, then the estate and the restriction must be commensurate. It being, however, clear that the wife surviving was to enjoy the income, (the provision for the children being to take effect only from and after the decease of the husband and wife,) the clause giving the income to the wife cannot be so restricted; and, consequently, the trust must be considered as a direction to pay the dividends to the wife for her life, or her appointees, without anticipation; and, if such had been the words used, the direction would have been operative during the second coverture, notwithstanding the inoperative reference to the first husband and his debts.

On the grounds, therefore, that, in the present state of the authorities, the cases referred to as having been decided by the *Vice-Chancellor of England* cannot be considered as regulating the decision of this case, and that as the true construction of the settlement creates a gift for the separate use, without anticipation, to operate for the whole life of the donee, the second husband was bound by this provision, I decide that the assignment by the second husband and the wife was void. The order, therefore, of the Court below must be reversed, and an order made according to the prayer of this petition, that the dividends arising from the fund in court be paid to the wife for her life. The costs of the trustees will be paid out of the dividends.

1849.

Dec. 21st
& 22nd.

1850.

Feb. 19th.

Land charged with an annuity is only liable for six years' arrears, under the 3 & 4 Will. IV, c. 27, although the grantor may be liable on covenant for twenty years' arrears, under the 3 & 4 Will. IV, c. 42.

Statement.

HUNTER v. NOCKOLDS.

THIS was an appeal from a decision of the Vice-Chancellor *Wigram*. The question was, whether, with reference to the two Acts of 3 & 4 Will. IV, c. 27 and c. 42, the grantee of an annuity could recover arrears of the annuity for more than six years, out of the rents of the lands on which the annuity was charged.

By an indenture of the 5th of February, 1829, Sir *F. Vincent*, in consideration of 999*l.*, granted to *Henry Dawson* an annuity of 111*l.* per annum for ninety-nine years, if Sir *F. Vincent* and *Edward Wyndham Harrington Schenley* should so long live; and the annuity was charged by Sir *F. Vincent* upon certain estates, which were comprised in his marriage settlement, and in which he had an estate for life, subject to certain charges and incumbrances. The grantee was empowered to enter and distrain for the annuity, in case it fell into arrear for twenty-one days; and, as a further security, the estates were demised to *George William Rowley* for one hundred years, if Sir *F. Vincent* should so long live, upon trust to raise the annuity, if in arrear, by sale or otherwise. Sir *F. Vincent* and *E. W. H. Schenley* covenanted to pay the annuity, and after making provision for effecting an assurance upon their lives in a sum not exceeding 1050*l.*, they also covenanted to pay all extra premiums which might be payable in the event of their going abroad; and the premiums, if paid by the grantee of the annuity, were to be charged on the estates, as effectually as if they had been part of the annuity.

A memorial of the deed was duly enrolled, and a judgment for 2000*l.* was signed by Sir *F. Vincent*, in February, 1831, and docketed and registered. In 1830, *E. W. H. Schenley* was residing abroad, and an assurance upon his life was

effected by *H. Dawson*, the grantee, in the sum of 1000*l.*, at the annual premium of 81*l.* 10*s.* while he resided abroad, and of 26*l.* when he returned to *England*. No payments were made in respect of the annuity or premiums, except 250*l.* *H. Dawson* died in 1834, and *John Dawson* and *G. W. Rowley* were his personal representatives. This suit was instituted in December, 1846, and the validity of some of the charges on the settled estates of Sir *F. Vincent*, and the priorities of the different charges, formed part of the matters which were disputed in the suit. A receiver was appointed very shortly after the bill was filed. *John Dawson* and *Rowley* presented a petition, upon which an order was made on the 31st of July, 1848, by which it was referred to the Master to inquire whether the Petitioners were entitled to any annuity or charge upon the estates in question; and, if so, to state the priority of their security, and what was due in respect of it; and also the priority of other incumbrances.

The Master made his report, dated the 21st of June, 1849; and thereby, after stating the order of the several incumbrances, he found that there were due to the Petitioners twenty-four quarterly payments of the annuity, viz. from August, 1842, to May, 1848, both inclusive, and such payments for extra premiums as had been made within six years from the date of the order of reference.

The executors of *Henry Dawson* were dissatisfied with that finding, and insisted that they were entitled to all the arrears of the annuity, and to the amount of all the extra premiums in respect of the policy of assurance. They therefore presented a petition, stating that the receiver who had been appointed had kept down the interest and annual payments which had priority over the annuity in question, and had a large balance in his hands; and they prayed, in effect, that that balance might be ap-

1849.
 HUNTER
 v.
 NOCKOLDS.
 —
 Statement.

1849.
 HUNTER
 v.
 NOCKOLDS.
 ———
Statement.

plied in payment of all the arrears of the annuity and the extra premiums. The petition was heard before the Vice-Chancellor *Wigram*, in July, 1849. His Honor referred to the case of *Du Vigier v. Lee* (a), which was between a mortgagor and mortgagee, and in which he had held, that where there was a covenant to pay the mortgage debt, under which the mortgagee could recover arrears of interest for twenty years, the Act of 3 & 4 Will. IV, c. 42, left the land liable for the whole amount which might be recovered on the covenant; that the annuity, in this case, was secured by a demise, by a covenant to pay, and by a judgment; and that, as the grantee would have a claim for arrears for twenty years, under the covenant, he thought the land was chargeable with all the arrears of the annuity; and that all the premiums, being periodical payments, were also charges upon the land.

John Hugh Bainbridge, who was an incumbrancer posterior to *Dawson*, now appealed from that decision.

Argument.

Mr. *Humphry* and Mr. *G. L. Russell*, for the Appellant.

The object of the 3 & 4 Will. IV, c. 27, s. 42, was to exempt land from all liability for arrears of rent or other charges for more than six years. The later Act of the same session (c. 42, s. 3) allowed an action to be brought for twenty years' arrears. The two enactments are quite consistent; but the personal liability, in this case, of the grantor of the annuity for twenty years' arrears, will not make the land liable for the same arrear in spite of the 3 & 4 Will. IV, c. 27: *Harrison v. Duignan* (b), *Henry v. Smith* (c), *Hughes v. Kelly* (d). In *Du Vigier v. Lee* (a)

(a) 2 Hare, 326.

(b) 2 D. & War. 295.

(c) 2 D. & War. 381.

(d) 3 Id. 482.

there were no second incumbrances. [They also cited *James v. Salter* (a), *Hodges v. The Croydon Canal Company* (b), *Francis v. Grover* (c).]

1849.
HUNTER
v.
NOCKOLDS.
Argument.

The *Solicitor-General* and Mr. *Southgate* appeared for the Plaintiff.

Mr. *Schomberg* appeared for Sir *F. Vincent*.

Mr. *Teed* and Mr. *Pryor*, in support of the *Vice-Chancellor's* decision.

The 3 & 4 Will. IV, c. 42, clearly authorises the annuitant in this case to bring an action against the grantor, and, as soon as judgment is recovered, it becomes a charge on the real estate. In order, therefore, to prevent this circuitry of proceeding, the *Vice-Chancellor* considered, both in this case and in *Du Vigier v. Lee* (d), that where a charge on land was secured by a covenant, on which twenty years' arrears might be recovered, the later Act operated as an exception out of the former one, and that the land was chargeable with twenty years' arrears: *Paget v. Foley* (e), *Strachan v. Thomas* (f), *Kealy v. Bodkin* (g).

The LORD CHANCELLOR (without hearing the reply) intimated his opinion that arrears could be recovered for six years only, and that the conclusion at which the Master had arrived, was correct; but his Lordship stated that he would give further consideration to the subject, and pronounce judgment after the Vacation.

(a) 3 Bing. N. C. 544.

(e) 2 Bing. N. C. 679.

(b) 3 Beav. 86.

(f) 12 A. & E. 556.

(c) 5 Hare, 39.

(g) 1 Sausse & Sc. 211.

(d) 2 Id. 326.

1850.
 ———
 HUNTER
 v.
 NOCKOLDS.
 ———
 Feb. 19th.
 ———
 Judgment.

The LORD CHANCELLOR:—

The only difficulty in this case is as to the operation of the Statute of Limitations, the 3 & 4 Will. IV, c. 27, and the stat. 3 & 4 Will. IV, c. 42, on an annuity charged on land of the grantor, and also secured by his covenant. The question arises upon the Master's report on a reference to inquire as to the title to the annuity, the priority of charges, and what was due. The Master having found arrears due beyond the six years, the question raised is, whether, under these Statutes, six years or twenty years should be the limitation of arrears for an annuity so secured. The Vice-Chancellor *Wigram* having, in this and in a former case of *Du Vigier v. Lee* (a), devoted the greatest attention to this subject, and having decided that twenty years was a period applicable to this case, it has been my duty to consider the grounds of his judgment with reference to the Statutes, and to the construction which has, by other Courts, been put upon them.

The first Act, the 3 & 4 Will. IV, c. 27, has no preamble, and the title cannot be resorted to in construing the enactments; but all the earlier provisions relate to the limitation of actions and suits relating to real property; and the 40th sect. having made twenty years after the accruer of the right, the period within which proceedings must be instituted to recover any sum of money charged upon or payable out of land, the 42nd sect. provides that no more than six years' arrears of rent or interest, in respect of any sum of money charged upon or payable out of any land or rent, shall be recovered by way of distress, action, or suit. The object of the Act being to relieve land from arrears of charges beyond the six years, but the enactment creating a bar to all actions and suits for money

(a) 2 Hare, 326.

charged on or payable out of land, the question probably arose, whether, in protecting the land, the Act had not relieved the debtor from his personal liability, which formed no part of its object. If so, this must have been soon discovered, for by the Act c. 42, of the same session, and passed only three weeks after the former Act, by the 3rd sect. it is provided, that all actions of covenant or debt on any specialty shall be sued and brought within twenty years after the cause of such actions or suits, but not after. This provision does not profess to deal with the land on which any demand might be secured, but with a personal action only; and the former Act professed to deal with the land only. And, so considered, there would be no inconsistency between these provisions, the subject-matter of each being different.

1850.
 HUNTER
 v.
 NOCKOLDS.
 Judgment.

No question could have arisen, but from the generality of the words "action or suit" in the 42nd sect. of the earlier Act; but whether the provisions of the latter Act, sect. 3, were framed without reference to the 42nd sect. of the earlier Act, but intending to provide for a different subject-matter, namely, personal liability, and not the charges on land, or whether it was intended to limit the generality of the former provisions by confining them to what was the subject of the Act, namely, the land, is not material; the provisions of the two must, if possible, be reconciled, which can only be done by construing the first Act as applicable only to the land, and the latter as applicable only to the personalty. If, as by the order under review, the remedy against the land be to be considered as extending to twenty years in all cases in which there is also the security of personal covenants, the two Acts would be wholly inconsistent; and the legislature must be supposed, within three weeks, by the second Act, to have repealed the first in by far the greater part of the cases to which it would apply. In some of the cases which have

1850.
 —————
 HUNTER
 v.
 NOCKOLDS.
 —————
Judgment.

arisen under the Acts, the Courts have treated the provision of the second Act as an exception out of the enactments of the former. The conjoint enactment would, in that case, be, that no more than six years' arrears of rent, or interest in respect of any sum charged on, or payable out of, any land or rent, shall be recovered by way of distress, action, or suit, other than and except an action on covenant or debt on specialty, in which case the limitation would be twenty years. This appears to me to be the only mode of reconciling the two enactments, and to have been the intention of the legislature. If, therefore, I had not had any guide but the enactments themselves, I should have put this construction upon them.

But I am not without assistance on this point, for such has been the construction adopted by the Court of Common Pleas and the Court of Queen's Bench in this country, and by Sir *Edward Sugden* as *Chancellor of Ireland*; there is not, indeed, a direct decision, but in all those cases sufficient was expressed to leave no doubt of the opinion of the learned Judges. In *Paget v. Foley* (a), Chief Justice *Tindal* and Mr. Justice *Park* treat the action of covenant not as a charge on land, where there is a covenant to pay, but as virtually an exception out of the former Act. In *Strachan v. Thomas* (b), the Court of Queen's Bench adopted the construction in *Paget v. Foley*, and Lord *Denman* says, "This is a rent-charge, and, as such, falls within the 42nd sect. of c. 27; but, notwithstanding that, we are of opinion that it falls within the 3rd sect. of c. 42, as being an action of covenant on a specialty;" that is to say, as to land, it is within the former, but as to the person, under the latter.

But the decision under review considers that this cannot be, and that the case, being within the 3rd sect. of c. 42, is taken out of the provision of the 42nd sect. of c. 27.

(a) 2 Bing. N. C. 690.

(b) 12 A. & E. 558.

There is, also, a very distinct opinion of Sir *Edward Sugden*, in *Harrison v. Duignan* (a), and *Hughes v. Kelly* (b). Vice-Chancellor *Wigram* states that he should probably have considered himself bound by Sir *Edward Sugden's* opinion, had he not the authority of his judgment for distinguishing between the English and Irish Acts. On examining what Sir *Edward Sugden* is reported to have said in these cases, I find what I consider as very distinct expressions of opinion in support of the decision adopted in this country, and before referred to. The only question in this case is, as to the charge on land.

1850.
 HUNTER
 v.
 NOCKOLDS.
 Judgment.

The result of my consideration is, that I think the true and natural construction of the Statutes is inconsistent with the order under review; and that this construction has been adopted and acted upon by the Court of Common Pleas and Queen's Bench, and by Sir *Edward Sugden* in *Ireland*. Notwithstanding, therefore, the high respect deservedly due to the opinion of Vice-Chancellor *Wigram*, and which I sincerely entertain, I am bound to hold that the Master's report is, in this respect, right; and that the order appealed from must, therefore, be reversed. The additional payment of the insurance is, I think, properly added to the arrears of the annuity.

Mr. *Teed* then submitted, that the six years ought to be computed from the date of the appointment of the receiver in the cause; but

The LORD CHANCELLOR held, that the six years must be computed from the period when the annuitant first made

(a) 2 D. & W. 298.

(b) 3 D. & W. 482.

1850.
HUNTER
v.
NOCKOLDS.

Judgment.

his claim, namely, from the 31st of July, 1848, the date of the order of reference to the Master to inquire as to the title, &c., of the Petitioners.

The costs of the petition before the Vice-Chancellor *Wigram*, complaining of the Master's finding, were ordered to be paid by the Petitioners, *Dawson* and *Rowley*.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

ACCOUNTS.

See LUNACY (*Committee*, 5).

1. The cases in which this Court will interfere to have complicated accounts taken in the Master's office instead of leaving them to be ascertained by an action at law, are difficult to define, and must be very much in the discretion of the Court. *South Eastern Railway Company v. Martin*, 69

2. *A.* died intestate in the year 1802, leaving his wife and several children surviving him. *B.*, his brother, by means of misrepresentation, procured letters of administration to be granted to him, and placed himself *in loco parentis* to the children. The youngest child attained twenty-one in September, 1823, and in May, 1825, he signed an account furnished him by *B.*, acknowledging, in writing, at the foot of it, that he had had a satisfactory investigation of that account, and the administrator's general account of the intestate's estate and effects, and confirmed the same. In January, 1828, he received the sum appearing on the signed account, as the balance due to him in respect of his share of the intestate's estate. In

September, 1843, he filed a bill seeking to open the account. At the hearing, divers errors were proved to exist in the administrator's account; some entries made by the administrator in his books being fictitious, and some items being omitted in his accounts. Notwithstanding seventeen years had elapsed since the settlement, and two years since the discovery of errors in the administrator's accounts, the Court set aside the account, and decreed the same to be taken anew, declining to limit the relief to the right to surcharge and falsify the account. *Allfrey v. Allfrey*, 179

3. In considering whether a decree ought to be made opening accounts generally, or only to surcharge and falsify, if it be a question whether the one party is likely to suffer injustice more from one form of decree than the other from the other form of decree, the Court ought to lean towards the side of an injured party, rather than to the side of the offending party. *Ib.*

4. The rule laid down in *Vernon v. Vawdry*, 2 Atk. 119, and followed in *Wedderburn v. Wedderburn*, 2 Keen, 722, and 4 My. & Cr. 41, approved. *Ib.*

ACTION AT LAW.

See PATENT, 1.
INJUNCTION, 10.

ADMINISTRATRIX.

See PARTNERSHIP, 1.

ADMISSIONS.

See PATENT.

AFFIDAVITS.

See INJUNCTION, 3.

ANNUITY.

Land charged with an annuity is only liable for six years' arrears under the 3 & 4 Will. IV, c. 27, although the grantor may be liable on covenant for twenty years' arrears under the 3 & 4 Will. IV, c. 42. *Hunter v. Nockolds*, 644

ANNULLING FIAT.

On a petition presented by the bankrupt, with the consent of his creditors, to the *Lord Chancellor*, seeking to annul the fiat issued against him previously to the passing of the Bankrupt Law Consolidation Act, the *Lord Chancellor* granted the order to annul the fiat, but on the express grounds of there being proceedings pending. *In re Harwood*, 572

ANSWER.

See PRACTICE, 1.

Where a Defendant was unable from illness to put in an answer, but was in possession of his mental faculties, an order for assigning him a guardian to put in his answer, was discharged, the proper course in such a case being to apply for an extension of time for putting in an answer. *Willyams v. Hodge*, 574

APPEAL.

See ENROLMENT.

JOINT-STOCK COMPANIES WINDING-UP AMENDMENT ACT.

PRACTICE, 1.

1. Where an order was varied on appeal, upon grounds which were not mentioned to the Court below, the party moving was ordered to pay the costs of the application. *Steele v. Plomer*, 149

2. In determining the question of costs, on an appeal, the *Lord Chancellor* places himself in the situation of the Judge in the Court below; and, if the motion has been improperly granted there, the *Lord Chancellor* reverses the order made, with the costs incurred in the original motion. *Beardmer v. The London and North Western Railway Company*, 161

3. Where, upon an appeal to the *Lord Chancellor*, he considers that the cause ought not to be disposed of without sending a case to a Court of common law, the decree appealed from should be reversed, and a case directed: and the cause is then remitted for subsequent proceedings to that branch of the Court from which the appeal was made. *Salkeld v. Johnston*, 329

4. The Master charged with the winding up of a Company, having, on two separate occasions, declined to place the name of *J. P.* on the list of contributories, either on his own account or in the character of a personal representative, and the *Vice-Chancellor* having, on two distinct appeals from those decisions, affirmed the same, an application was made to the *Lord Chancellor* to vary the two orders of the *Vice-Chancellor*, and asking that *J. P.* might be included in the list of contributories, as a contributory either in his own right or as personal representative of his late father, for a certain number of shares in the Company, or any less number of shares, and

either for the whole in one character, or for part in one character and other part in another character, as the Court should think fit:—*Held*, on a preliminary objection, that this was in the nature of an original motion, and ought not to be heard before the *Lord Chancellor*. *In re The St. George's Steam Packet Company, Ex parte Pimm*, 388

5. The Judge in the Court below, having, at the request and with the consent of both the Plaintiff and Defendant, undertaken to decide a cause, although he considered the question raised proper for an issue:—*Held*, that although the parties, by their recorded consent in the decree appealed from, had precluded themselves from asking for an investigation of the claim, the subject-matter of the suit, before a jury, the Court would permit the Appellant to shew, if he could, that what he claimed was so far free from doubt as to entitle him to the decree sought by his bill, without the intervention of a jury; but if he fails in doing so, the appeal will be dismissed. *Stewart v. Forbes*, 461

6. *Semble*, parties to a suit cannot, by their consent or other acts, on a rehearing or appeal, call on the Court to decide on a matter which, in the usual course, ought to be sent to and determined by another tribunal. *Ib.*

7. Effect upon proceedings on appeal, where the Court below offered to send a case for the opinion of a Court of law, but the parties concurred in asking for the decision of the Court without a case. The fact of such a proceeding ought to be stated in the decree. *Cole v. Scott*, 477

8. Observations upon the conduct of a Defendant who appeals without having taken any part in the discussion in the Court below. *Christ's Hospital v. Grainger*, 533

9. The Court, on an appeal, looks at what the Appellant seeks to correct,

and not at the reasons given in the Court below, for its decision, and disposes of the costs of the appeal accordingly. *Cradock v. Piper*, 617

APPEARANCE.

Where a husband resided out of the jurisdiction, (in *Scotland*), and his wife lived apart from him, and the husband had been served, under the 33rd Order of 1845, on behalf of himself and wife, with the subpoena and office copy of the bill and order, and the husband had entered an appearance for himself alone, the Plaintiff was held entitled, under that Order, to enter an appearance for the wife. *Steele v. Plomer*, 153

ARREARS.

See ANNUITY.

BANKRUPT.

See ANNULING FIAT.
Costs, 2.

BILL OF REVIEW.

See PLEADING, 1.

BUILDING SOCIETY.

A member of a building society purchased shares, in respect of which a sum of money was advanced to him, and he executed a conveyance to the trustees of the society, to secure the payment and observance by him of all subscriptions, fines, and regulations of the society; and, in default, the trustees were to sell, and retain out of the proceeds, all such subscriptions and other payments as should be then due, and should thereafter become due, in respect of those shares, calculating the probable duration of the society; and it was agreed, that all monies which should thereafter be-

come due, should be considered as due at the time of the sale. By the rules of the society, a purchasing member was entitled to redeem, upon payment of the difference between the amount secured by the mortgage, and the amount of his subscriptions and his share of the profits. No profits had been made in this case:—*Held*, that the Plaintiff was not entitled to redeem, upon payment of the difference between the sum advanced and the amount paid by him for subscriptions, &c.; but only upon payment of all subscriptions which would become payable during the probable duration of the society; and that those future subscriptions were to be paid in full at the time of redemption. *Mosley v. Baker*, 301

CHARITY.

See CORPORATION, 1.

1. The Court has jurisdiction upon a petition presented under Sir Samuel Romilly's Act, not only where the trustees of charity estates require directions to carry out a defined trust, but also where, although the application of future surplus funds has been already provided for by an Act of Parliament, the trustees ask for a reference to the Master, as to the expediency of applying for another Act of Parliament to authorise the application of the surplus in a different manner. *In re the Shrewsbury Grammar School*, 401

2. Property was bequeathed to a Corporation upon certain trusts, for the benefit of the poor of the town, with a proviso, that if the Corporation failed for one year to apply the trust property in a proper manner, it should be transferred to the Corporation of L., for the benefit of *Christ's Hospital*. By a decree on information, the application of the trust property was varied, but a similar provision was in-

serted in case of the misapplication of the trust property. A misapplication having taken place, it was held that the gift over was not repugnant to the original gift, nor void on the ground of perpetuity; that the forfeiture was still operative, and that the claim of the Plaintiffs [*Christ's Hospital*], was not barred by the lapse of more than twenty years from the time at which the misapplication of the trust property took place, and was known to them, and that they were entitled to call for a transfer of the property. *Christ's Hospital v. Grainger*, 533

CHARITY TRUSTEES.

1. The Court does not act on its own knowledge of the fitness of parties named in a petition seeking the appointment of new trustees in the room of deceased trustees of charities, but makes the usual reference to the Master. *In re The Shrewsbury Municipal Charities*, and *In re The Governors and Trustees of the Free Grammar School at Shrewsbury*, 204

2. Where a party set up an unfounded claim, and in consequence of such claim was served with a petition, the Court declined making any order as to his costs. *Ib.*

3. On a petition seeking a reference for the appointment of new trustees in the room of deceased trustees of corporation charities, the Court declined giving any directions for any attendance on behalf of the corporation before the Master. *Ib.*

CHARTERPARTY.

By a charterparty, certain monthly payments were agreed to be made by the charterers to the ship-owners on account of freight, and the remainder was to be paid when the ship returned. But the real agreement between the parties was, that the adventure

should be at their joint risk. The charterparty was allowed to remain in the hands of the owners, who deposited it with their bankers as a security for monies lent by them. The bankers gave notice of the deposit to the charterers, and claimed and received from them several monthly payments on account of freight. The owners became bankrupt, and on the return of the ship the adventure proved to be a losing one; and the charterers then first informed the bankers of their agreement with the owners that the speculation should be at their joint risk:—*Held*, that, although the equity of the charterers was originally prior to that of the bankers, their conduct had precluded them from insisting upon it; and that they were not entitled to an injunction to restrain the bankers from proceeding with an action to recover the whole of the remainder of the freight. *Mangles v. Dixon*, 542

CO-DEFENDANT.

See EXAMINATION OF PARTIES.

COLLEGE STATUTES.

Where the statutes of a College required a certain number of the fellows to be in holy orders, and directed, that in case the number of clerical fellows became incomplete in consequence of a fellowship being vacated, the next fellow in point of seniority should take holy orders within one year, or *à Collegii emolumentis recedat*, it was held, in the case of a fellow who failed to comply with the statutes, by taking holy orders, that his fellowship had become altogether vacant, and that it was not sufficient for him to give up the emoluments while the number of clerical fellows remained incomplete. *In re St. Catharine Hall, Cambridge, Ex parte Goodwin*, 601

COMPENSATION.

See LANDS CLAUSES CONSOLIDATION ACT, 1—3.

VENDOR AND PURCHASER, 2.

CONDITIONS OF SALE.

See VENDOR AND PURCHASER, 2.

CONTRACT.

See CORPORATION, 3.
NOTICE.

CONTRIBUTORY.

See JOINT-STOCK COMPANIES WINDING-UP ACT, I.

COPYRIGHT.

See INJUNCTION, 1, 4.

CORPORATION.

See JOINT-STOCK COMPANY.

1. A charity was founded some time in the 12th century, and was commonly called "The Master, Brethren, and Sisters of the Hospital of St. John the Baptist." In the time of Charles II, the mastership of the hospital and the lands &c. belonging to it were granted to the Corporation of Chester. The leases of the hospital lands had never been granted by the Corporation under their common seal; but, in the leases, the Corporation were described as being the Master of the Hospital, and the rents were reserved to the Master, Brethren, and Sisters. An information was filed against the Corporation of Chester and the parties who had been appointed trustees of the charity estates under the Municipal Corporations Reform Act, to ascertain the charity lands, and to have a scheme for the due regulation of the charity; to which information the Master, Brethren, and Sisters of the Hospital were not made parties as

a corporate body. It was decided by the Court, that they did not form a corporate body; and, consequently, an objection, that they ought to have been made parties to the information, as a corporation, was not sustained. *Attorney-General v. The Corporation of Chester*, 46

2. The objection, that the hospital ought to have been a party to the information as a corporate body, was not taken by the Corporation of *Chester* until several years after the decree had been made. Whether such an objection, if valid, would be allowed to be taken by such a party after such a lapse of time, *quære*. *Ib.*

3. A contractor sent in a tender to a Railway Company for the execution of part of the works, either with a double or single line of rails. He was informed, in writing, by the engineer of the Company, that his tender was accepted, and that intimation was confirmed by the directors, upon his attendance at one of their board-meetings, but no document accepting the tender was executed by the Company in such a manner as to be binding at law; nor was any conclusion ever come to whether there should be a single or a double line. The railway was afterward abandoned, and the contractor then filed a bill seeking to have a binding contract executed by the Company, or to recover from them the loss which he had sustained in preparing for the works:—*Held*, upon demurrer, that he had no claim to relief in equity upon the general merits of the case; and that an allegation, unsupported by any additional facts, that the Company held money in their hands for the purpose of paying the Plaintiff, and were trustees of it for his benefit, under an instrument in writing, was not sufficient to sustain the bill. *Jackson v. The North Wales Railway Company*, 75

COSTS.

See APPEAL, 1, 2, 9.

CHARITY TRUSTEES, 2.

CREDITORS' SUIT, 1.

DISMISSAL OF BILL.

IRREGULARITY.

PAUPER.

1. An order for payment of the costs of a contempt will include the costs of a sequestration, although the sequestrators have not yet made a return; and the direction for the taxation of the costs should be absolute, and not dependent upon the fact whether the parties differ about the same. *Steele v. Plomer*, 149

2. A few days after the bill was filed, the Defendant became bankrupt. The Plaintiff soon afterward obtained the common injunction for want of answer, to restrain an action at law, and no further steps were taken, either in the action or in the suit, for two years. The Defendant had not yet got his certificate, but had been declared entitled to it. He then put in his answer, and was in a situation to move to dismiss for want of prosecution:—*Held*, that, notwithstanding his bankruptcy, and the other circumstances of the case, he was entitled to an order that the bill should be dismissed, *with costs*. *Blackmore v. Smith*, 155

3. Where a bill is dismissed with costs, the costs of a case sent to law will not necessarily be included, unless specifically mentioned in the decree—*Semble*. *Salkeld v. Johnston*, 347

4. The Court has no power to set off the costs recovered at law by the Plaintiff in an action against the costs given to the Defendant on a renewed and unsuccessful motion for an injunction. *Sainter v. Ferguson*, 383

5. The general rule, that the costs of two Counsel only ought to be allowed in taxation, as against an opponent, will seldom be departed from,

and applies particularly to cases heard on appeal. *Attorney-General v. Munro*, 457

6. At a meeting to settle the list of contributories to a Company, which had been ordered to be wound up under the Joint-stock Companies Winding-up Act, 1848, the list which was produced was held not to have been irregularly deposited:—*Held*, that neither the Master nor the Court had jurisdiction to order the official manager to pay the costs of the alleged contributories, who had been summoned by him to attend the meeting. *In re The Cambridge and Colchester Railway Company, Ex parte Marsh*, 578

7. Under a general order to tax costs, the Taxing Master is at liberty to disallow the costs of a solicitor who is also a trustee, except costs out of pocket. *Cradock v. Piper*, 617

COUNSEL (NUMBER OF).

See COSTS, 5.

COVENANT.

See INJUNCTION, 7.

CREDITORS' SUIT.

See INFANT.

PRACTICE, 3.

VOLUNTARY SETTLEMENT.

1. Although a cause of action arises entirely in *Scotland*, and all the witnesses reside there, the creditor will not be allowed to proceed with an action there, after a decree has been obtained in *England* for the administration of the deceased debtor's estate, and the Scotch creditor has come in before the Master to prove his debt; and he will be liable to pay the costs of an application to restrain him from prosecuting his action. *Graham v. Maxwell*, 247

2. Two creditors' suits were instituted for the administration of the same estate, one of which asked for an

account of the profits made by the personal representative of the debtor in carrying on the business after his death. In the other suit, a decree had been obtained for taking the ordinary accounts only. A motion to stay proceedings in the first suit was refused. *Underwood v. Jee*, 379

CURATOR BONIS.

See LUNACY, 1, 2.

DEMURRER.

See JOINT-STOCK COMPANY.

DEPOSIT OF TITLE DEEDS.

See PRACTICE, 3.

DEVISE.

1. A testator gave certain portions of his real and personal estate to trustees for payment of his debts; and he specifically gave several portions of his real and personal estate to different parties "freed from his debts;" and also bequeathed his residuary personal estate "freed from his debts." One of the devised estates was subject to a mortgage. The funds primarily applicable being insufficient to discharge all the debts, the property which passed under the residuary clause was held to be the next fund which ought to be resorted to for that purpose; and the devisee of the mortgaged estate was declared to be entitled to have the mortgage paid off out of the residuary estate. *Lord Brooke v. The Earl of Warwick*, 142

2. Where a testator devised the house "wherein I now reside," and "all the remainder of my real estates whereof I am now seised," and afterwards devised "all such trust estates as are now vested in me, or, as to the leasehold premises, as shall be vested in me at the time of my death," freehold estates purchased by him between the date of his will and his death, did not pass under the devise. *Cole v. Scott*, 477

DISMISSAL OF BILL.

See Costs, 2.

A testator directed real estate to be sold and the proceeds divided. One of the parties interested made two mortgages of his share, and then, before the trust fund was divisible, filed his bill against all the other parties interested, for the performance of the trusts, charging the trustees with a breach of trust in not selling the estate and accumulating the income as directed by the will. When the fund became divisible, the trustees paid each of the other legatees his share. One of the trustees under the will was one of the personal representatives of the first incumbrancer. A motion on behalf of all the Defendants, except the second mortgagee, that the bill might be dismissed as against all the Defendants except him, and the parties who claimed under the prior mortgage, was granted: the Plaintiff and the second mortgagee receiving their costs up to that time, and the Plaintiff's share being paid into court. *Sawyer v. Mills*, 569

DIVIDENDS.

The *Lord Chancellor* will order payment by the Bank of *England* to the *curator bonis* of a lunatic, of the past dividends due on Bank Annuities, but not future dividends. *In re Morgan*, 212

ENROLMENT OF ORDER.

1. It is no objection to the enrolment of an order, pronounced in one of the Courts below, under the Joint-stock Companies Winding-up Acts, 1848 and 1849, that it has been effected with unusual expedition; but a party will not be deprived of the opportunity of appealing against an order, if he have been thrown off his guard, and misled by his opponent, who

EXCEPTIONS.

afterwards enrols the order. *In re The Direct London and Exeter Railway Company, Ex parte Hollingsworth*, 587

2. The mere statement by the unsuccessful party to his opponent, of his intention to appeal against an order, will not preclude the latter from the right to enrol the same. *Ib.*

3. The Joint-stock Companies Winding-up Acts, 1848 and 1849, do not affect the practice of the Court, applicable to the enrolment of orders or decrees. *Ib.*

EXAMINATION OF WITNESSES.

1. Where a Plaintiff's solicitor knew the names, &c., of the witnesses who were examined before a Commissioner, and was at the inn where the examination took place, but had not received any notice respecting them from the other side, an application to suppress the depositions after publication, no objection being made at the time, was refused, with costs. *Smith v. Pincombe*, 250

2. Where witnesses are to be examined before a Commissioner, whether it is necessary to give notice to the other side, of the names, &c. of the proposed witnesses, *quære*. *Ib.*

EXAMINATION OF PARTIES.

An order obtained by a Defendant for the examination of a co-Defendant as a witness, need not be served on the Plaintiff. *Smith v. Pincombe*, 250

EXCEPTIONS.

Form of order, where, after exceptions to the original bill had been allowed, the Defendant had put in a further answer to the original bill and an answer to the amended bill together, and the Plaintiff wished to refer the further answer upon the original exceptions. *Watson v. Life*, 308

EXECUTORS.

1. A person who, at the death of a testator, had part of the testator's estate in his hands, and who was appointed one of his executors, was allowed by the co-executors to retain the monies in his hands, and afterward became bankrupt. The co-executors were held liable to make good the loss to the testator's estate. *Stiles v. Guy*, 523

2. The liability of executors to make good a loss, is regulated by the same principles, whether the loss arises from their omitting to call in a debt due to the testator's estate, or from their allowing a balance to remain in the hands of a co-executor. *Ib.*

3. An executor is not protected merely by passiveness from liability on account of a *devastavit* committed by his co-executor; but it is the duty of co-executors to watch over, and, if necessary, to correct the conduct of each other. *Ib.*

FELLOWSHIP.

See COLLEGE STATUTES.

FORFEITURE.

See CHARITY, 2.

GUARDIAN.

See ANSWER, 1.

HUSBAND AND WIFE.

See APPEARANCE, 1.

By a post-nuptial settlement, a sum of money, the property of the wife, was vested in trustees, upon trust to pay the income as the wife should from time to time appoint, not by way of anticipation; and, in default of appointment, to the wife for her separate use, independent of *G.* her husband; and from and after her death, to *G.* the husband, for life; and from and after the death of the survivor, to the children of the marriage,

as therein mentioned; and, if there should be no children, and the wife should survive *G.* the husband, the whole trust property to be paid to her; and if *G.* the husband should survive the wife, then, at his death, as the wife should appoint, or, if no appointment, to her next of kin:—*Held*, that, although no reference was made in the settlement to any future coverture, still the trust for the separate use of the wife, and the clause against anticipation, protected the interest of the wife during a second marriage, and that a charge by her and her second husband upon her life interest in the trust property, was invalid. *In re, Gaffee's Settlement*, 635

INCUMBRANCE.

1. By a charter-party certain monthly payments were agreed to be made by the charterers to the shipowners, on account of freight, and the remainder was to be paid when the ship returned. But the real agreement between the parties was, that the adventure should be at their joint risk. The charter-party was allowed to remain in the hands of the owners, who deposited it with their bankers as a security for monies lent by them. The bankers gave notice of the deposit to the charterers, and claimed and received from them several monthly payments on account of freight. The owners became bankrupt, and, on the return of the ship, the adventure proved to be a losing one, and the charterers then first informed the bankers of their agreement with the owners that the speculation should be at their joint risk:—*Held*, that, although the equity of the charterers was originally prior to that of the bankers, their conduct had precluded them from insisting upon it, and that they were not entitled to an injunction to restrain the bankers from proceeding with an action to

recover the whole of the remainder of the freight. *Mangles v. Dixon*, 542

2. *Semble*, where a party, who has a prior equitable lien upon a fund, receives notice of a second incumbrance, made without any previous communication with or inquiry from him, but conceals his prior equity, and makes payments to the second incumbrancer inconsistent with it, he will be postponed. *Mangles v. Dixon*, 542

INDEMNITY.

See VENDOR AND PURCHASER, 1.

INFANT.

Where the personal estate of a debtor was insufficient to discharge all his debts, the right of his simple contract creditors to have their debts satisfied out of his real estate, which had descended to his heiress-at-law, was held not to have been defeated by articles executed by her while still a minor, previously to and in contemplation of her marriage. *Pimm v. Inall*, 487

INJUNCTION.

See CREDITORS' SUIT, 1.

LANDS CLAUSES CONSOLIDATION ACT, 3.

RAILWAY COMPANY.

1. The maker and owner of etchings which have never been exhibited or published, and of which no impressions have been made except for his private use, but impressions whereof have, by improper and surreptitious means, come into the possession of other parties, is entitled to an injunction, not only to restrain those parties from exhibiting those impressions, and from publishing copies of them, but also to restrain them from publishing a catalogue compiled by themselves, in which an enumeration and

descriptive account of those etchings is contained, and that, although there is no violation of any contract, either express or implied, between the owner and the compilers of the catalogue. *Prince Albert v. Strange*, 1

2. Where A. and B. were respectively the makers and owners of several etchings, of which a catalogue was proposed to be improperly published by a person who had surreptitiously obtained copies of the etchings, and a bill was filed by A. against the publisher of the catalogue and B., A. was held to be entitled to an injunction to restrain the publication of the catalogue generally, not only so far as it related to his own etchings, but likewise so far as it related to those of B. also. *Ib.*

3. On a motion to dissolve an injunction granted on an original bill, affidavits filed in support of allegations subsequently introduced, by amendment, to strengthen the Plaintiff's case, cannot be read against the Defendant. *Ib.*, 26

4. A person who attends oral lectures is not justified in publishing them for profit; and an action at law will lie upon the implied contract by the lecturer against a pupil attending oral lectures who causes them to be published for profit. *Abernethy v. Hutchinson*, 28

5. An injunction will be granted against third persons publishing lectures orally delivered, who have procured the means of publishing those lectures from parties who attended the oral delivery of them, and were bound by the implied contract. *Ib.*

6. Where surveyors had commenced an action against a Railway Company for a large balance claimed in respect of work done, and monies expended by them for the Railway Company, the particulars of demand in such action being 400 in number, but there being no dispute as to the sums paid by the Company on account, this Court

refused to restrain the prosecution of the action, where the Railway Company had, by their bill, asked for a discovery as to numerous documents, and stated that they should thereby be enabled to defend the action at law, and had not applied for an injunction till more than a year after the action had been commenced, and when it was likely to come on soon for trial. *The South Eastern Railway Company v. Martin*, 69

7. A purchaser of land, which was conveyed to him in fee-simple, covenanted for himself, his heirs, executors, administrators, and assigns, with the vendor, his heirs, executors, and administrators, that the land should be used and kept in ornamental repair as a pleasure-garden, for the benefit of the occupiers of houses in the neighbourhood which belonged to the vendor:—*Held*, that the vendor was entitled to an injunction as against the assigns of the purchaser, to restrain them from building upon the land, although the character of the neighbourhood had been greatly changed by the increase of building there, and its privacy as a place of residence had been very much diminished by the opening of thoroughfares, and the occupiers of the vendor's houses had ceased to use the garden, or to pay for the privilege of doing so; and although the vendor had not obtained any decision, in a court of law, whether the covenant did or did not run with the land, so as to be binding on the parties who claimed under the original purchaser. The jurisdiction of this Court, in such cases, is not fettered by the question whether the covenant does or does not run with the land. *Tulk v. Moxhay*, 105

8. The established practice, which requires the common injunction to be dissolved by the usual order *nisi* and order absolute, is not affected by the

VOL. I.

fact that the time allowed by the rules of the Court for taking exceptions to the answer has elapsed. *Raincock v. Young*, 197

9. Where an *ex parte* injunction has been dissolved on the ground of misrepresentation or concealment, the Plaintiff is not thereby precluded from applying again for an injunction on the merits. *Fitch v. Rochfort*, 255

10. *A.*, in consideration of *B.* engaging him as his assistant in the business of an apothecary, at a stated salary, agreed in writing with *B.*, not to practise as an apothecary within seven miles of the town of *M.*, under a penalty of 500*l.* *A.*, having been discharged by *B.* from his service, proceeded to practise as an apothecary in the town of *M.*; whereupon *B.* moved for an injunction to restrain *A.* from so practising; but the motion was ordered by the Court to stand over, with liberty for *B.* to bring an action. In the action *B.* recovered 500*l.* damages and the costs against *A.*, and entered up judgment for the same, and afterwards proved under a fiat in bankruptcy issued against *A.* for the amount of the costs, but not for the damages:—*Held*, that an injunction granted against *A.* on a renewed motion could not be maintained, and that *B.* was not entitled to any equitable right arising out of the legal contract entered into between the parties. *Saintier v. Ferguson*, 383

INTEREST

See PAWNBROKER.

VENDOR AND PURCHASER, 2.

1. After some disputes between a corporation and trustees of charity estates, a compromise was agreed on and confirmed by Act of Parliament, under which the corporation were to sell certain estates, and out of the proceeds pay to the trustees a gross sum of money by a fixed day. The money

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was not paid by the time appointed; but there being no case of wilful default made against the corporation, it was held, that they were not liable to pay interest on the gross sum. *The Attorney-General v. The Corporation of Ludlow*, 216

IRREGULARITY.

See PRACTICE, 1.

An application by the Defendant to the *Master of the Rolls* to discharge, for irregularity, an order of course, had been refused, with costs; but the order was varied by the *Lord Chancellor*, on appeal, on the ground that the form of the order, though the usual form, was inaccurate:—*Held*, notwithstanding, that the Defendant ought to pay the costs of the motion at the Rolls, and that, although the cause belonged to a Vice-Chancellor's Court, and the Defendant was therefore unable to move at the Rolls to discharge the order, except for irregularity. *Watson v. Life*, 308

JOINT-STOCK COMPANY.

A shareholder in a trading Company, who possessed both original and preferential shares, filed a bill on behalf of himself and all the other shareholders, except the Defendants, complaining of acts done by the directors and the other Defendants injurious to the interests of the Company. The suit had not been authorised by any general meeting of the shareholders; but the Plaintiff alleged that it was not practicable for any parties but the directors to call such a meeting. The acts complained of consisted of improperly increasing the liabilities of the Company, by contracting debts and otherwise, and of giving to some of the holders of preferential shares an advantage over others, by changing their shares for debentures. These

acts were held to be within the general powers of the Company, and were done in consequence of, and, as the directors insisted, in accordance with, a resolution passed at a general meeting. A demurrer, on the part of the Company, for want of equity, was allowed, upon the ground that an individual shareholder was not entitled to be Plaintiff in a suit of such a nature; and that the interests of the original and preferential shareholders were not so identical as to admit of such a bill being filed on behalf of both sets of shareholders. *Lord v. The Copper Miners' Company*, 85

JOINT-STOCK COMPANIES WINDING-UP ACT.

See Costs, 6.

I. Contributory.

1. Where shares in a Banking Company had been transferred into the name of a minor by his grandmother, but the dividends had been paid to his father, and he had covenanted with the Company for the payment, by the son, of all instalments in respect of those shares, and to indemnify the Company against any loss which might be occasioned to them by reason of the son's minority or of the payment of the dividends, the name of the father was held to have been properly included, in respect of those shares, in the list of "contributories," within the meaning of the Joint-stock Companies Winding-up Act. *In re The North of England Joint-stock Banking Company, Ex parte Readeley*, 118

2. On the death of a shareholder in a Banking Company, the dividends were paid to his brother, the Bank having notice that there was no legal personal representative. A notice was served upon him under the Joint-stock Companies Winding-up Act, that the official manager proposed to insert his name as a contributory in respect of

those shares, as the representative of the deceased shareholder:—*Held*, that, under that notice, the Master had no jurisdiction to decide whether he was a contributory without qualification, or in any other character than as mentioned in the notice. *In re The North of England Joint-stock Banking Company, Ex parte Glaholm*, 121

3. A party who has transferred his shares in a joint-stock company within three years, may be included in the list of contributories prepared in pursuance of the Joint-stock Companies Winding-up Act, 1848; the order in which his liability attaches being a subject for future arrangement. *Ex parte Hawthorn, In re The North of England Joint-stock Banking Company*, 225

4. In pursuance of a resolution passed at an extraordinary general meeting of an unincorporated Company, a shareholder sold his shares to the directors, upon the terms, that he should withdraw from the Company, and be no longer liable to any debts of the Company. No power to enter into such an arrangement was contained in the deed of settlement of the Company:—*Held*, that the shareholder was still liable to the debts of the Company, and was properly included in the list of contributories, under the Joint-stock Companies Winding-up Act, 1848. *Ex parte Morgan, In re The Vale of Neath and South Wales Brewery Joint-stock Company*, 320

5. A widow was entitled, as executrix of her deceased husband, to some shares in a joint-stock banking Company, which stood in the name of her husband. On her second marriage she assigned them by deed to a trustee for her separate use. Verbal notice of that deed was given to the Company, but no transfer of the shares was ever made in the manner required by the Company's deed of settlement. The trustee received the dividends,

and signed receipts for them as agent for the widow, but his name was never returned to the Stamp Office as a shareholder until the stoppage of the bank:—*Held*, that these facts were not sufficient to authorise the Master to insert the name of the trustee in the list of contributories, under the Joint-stock Companies Winding-up Act; but leave was given to the official manager to try the question of the trustee's liability in an action at law, the Court refusing an issue for that purpose. *In re The North of England Joint-stock Banking Company, Ex parte Hall*, 580

6. A party who applied for and obtained an allotment of shares in a Company, and paid the deposit on them, was held to be a contributory, although he had not signed the deed of settlement, nor paid any call, and no other act had been done to make him a member. *In re The Universal Salvage Company, Ex parte The Earl of Mansfield*, 593

7. Contributories liable in respect of expenses, properly incurred by the directors, are not necessarily liable to losses or expenses incurred improperly by the directors. *Ib.*

II. Dissolution of Company.

1. In order to obtain an order under the Joint-stock Companies Winding-up Act, 1848, for the dissolution of a Company and the winding up of its affairs, it is not essential that there should be debts of the Company remaining unpaid; nor is it an objection that a suit is still pending, which has been instituted on behalf of the shareholders against the directors, for the purpose of making them personally liable for certain losses, but not asking for the dissolution of the Company. *In re The Borough of St. Marylebone Joint-stock Banking Company, Ex parte Walker, Ex parte Troutbeck*, 100

2. If the tests which are directed by the Act to be applied to try the sol-

veney of a Company, strictly and literally apply to a particular Company, but the presumption arising therefrom is rebutted by the evidence offered in opposition to the petition, so that there is no reason to believe that the Company is insolvent, the Court will refuse to interfere. *In re The Wheal Lovell Mining Company, Ex parte Wyld*, 125

3. A dispute having arisen between a Mining Company and one of the shareholders, respecting his liability to pay calls, the Company procured one of their creditors to bring an action against him. He served notice of the action on the Company, but they took no steps to stay the action or indemnify the shareholder. There were no circumstances to satisfy the Court that the Company was not in a solvent condition:—*Held*, that, although the case came within the letter of the 5th article of the 5th sect. of the Act, yet, as the action arose out of the dispute between the shareholder and the Company, and not from their inability to pay, he was not entitled, under the circumstances, to an order for winding up the concern. *In re The Wheal Lovell Mining Company, Ex parte Wyld*, 125

4. A Joint-stock Company, formed for the insurance of cattle, had sustained heavy losses, and was under liabilities to their insurers to a great amount. Many of the shareholders had been allowed to retire from the Company, so as to avoid any future liabilities:—*Held*, that the Court is not entitled, under the Winding-up Act, to look into the accounts of the Company; and there being none of the tests of insolvency provided by the Act, nor any act done which amounted to a dissolution of the Company, the Court refused to make any order for winding up the affairs of the Company. *Ex parte Spackman, In re The Agriculturist Cattle Insurance Company*, 229

III. *Scope of Act.*

1. Whether a Joint-stock Company formed for the insurance of cattle is within the scope of the Act—*Quære*. *Ib.*

2. A Mining Company, on the “cost book” system, formed before the passing of the Joint-stock Companies Winding-up Act, is not within its operation. *In re The Wheal Lovell Mining Company, Ex parte Wyld*, 125

3. The 2nd sect. of the Joint-stock Companies Winding-up Act is not intended to extend the operation of the Act to all Mining Companies; but it merely declares that such Companies as would have been within the provisions of the Act under the 1st sect., if they had been established for any other purpose, are not to be excluded merely because they are Mining Companies—*Semble*, *Ib.*

4. An association formed for the purpose of obtaining an Act of Parliament to make a railway for the carrying of passengers and goods is a commercial speculation, whether they propose to run their own engines and carriages, or to lease the railway to other parties; and such an association being provisionally registered, but the project being afterward abandoned, is within the scope of the Joint-stock Companies Winding-up Act. *Ex parte Barber, In re The London and Manchester Direct Independent Railway Company (Remington's line)* 238

5. An association was formed for making a railway from *Madrid* to *Valencia*, by means of a Company, which was to be a *compania anonima*, having its *locale* in *Spain*, and being subject to the commercial code of *Spain*. Two-thirds of the capital were to be subscribed in *England* and the remainder in *Spain*. The Spanish directors had been unable to raise one-third of the capital, and had therefore returned the deposits:—*Held*, that the

Company was (so far as related to the English subscribers) within the scope of the Joint-stock Companies Winding-up Act, 1848, and that the circumstances authorised the interference of the Court under that Act. *In re The Madrid and Valencia Railway Company, Ex parte James*, 597

JOINT-STOCK COMPANIES WINDING-UP AMEND- MENT ACT.

The 33rd sect. of the Joint-stock Companies Winding-up Amendment Act, 1849, is retrospective; and where notice of a motion of rehearing of an order made before the passing of that Act, had not been served within the time limited by the 33rd sect., the Court refused to hear the application. *In re The North of England Joint-stock Banking Company, Ex parte Sanderson*, 486

JURISDICTION.

See ACCOUNTS, 1.
CREDITORS' SUIT, 1.
INJUNCTION, 7.

LAND-TAX.

See LUNACY (Committee, 1).

LANDS CLAUSES CONSOLIDA- TION ACT.

See LUNACY, 6.

1. The fact that a Railway Company has had ample time for settling with the owner of land as to the amount of his compensation, but has neglected to do so, will not preclude them from taking possession, under the 85th sect. of the Lands Clauses Consolidation Act, upon complying with the directions of that section; and if the Company take possession, when, in consequence of some false

step, they were not entitled to do so, that section does not become inoperative, but they are at liberty to correct their error, and their possession will then be authorised. *Willey v. The South Eastern Railway Company*, 56

2. A bond to secure the payment of the compensation-money to, or the deposit of it in the Bank for, A. B., his executors, &c., but not referring to "the parties interested in the premises," is sufficient to satisfy the terms of the 85th sect., where the Company think proper to treat with the claimant as the party really entitled to the land, *Id.*

3. A Railway Company having by the construction of their line of railway permanently stopped up the passage through a street in a populous town, the owner of certain houses, manufactories, and other buildings, situate in that street, not directly affected by the railway works, and at a distance of 126 feet from the boundary line of the railway, gave notice in writing to the Company, under the 68th sect. of the Lands Clauses Consolidation Act, 1845, claiming a sum of money as compensation, in respect of his property being "*injuriously affected*" by the permanent stoppage of the street, and requiring the Company, in case they declined to pay that sum, to summon a sheriff's jury to assess the damages sustained by him:—*Held*, on bill filed by the Company to restrain the owner of the houses, &c. from proceeding upon the notice, and from taking any other proceeding to recover the sum claimed by him, that it was a proper case for an injunction; and directions were given by the Court, that the owner of the houses, &c. should bring his action at law, to try his right in the first instance, notwithstanding the 68th sect. of the Lands Clauses Consolidation Act, which confers on the

owner of houses, &c. the right to have his claim at once settled by a sheriff's jury, after notice in writing has been given by him to the Company; and the Court gave liberty to either party to apply, after the trial of the action, the parties undertaking to use the judgment under the direction of the Court. *The London and North Western Railway Company v. Smith*, 364

LECTURES.

See INJUNCTION, 4, 5.

LEGACY.

Bequest to trustees in trust to pay the annual income to A. for her life, and after her decease to assign the trust-fund to A.'s children, as and when they should severally attain twenty-one, in equal shares, to whom the testator gave the same accordingly, with benefit of survivorship, if any of them died before his share became payable; and a direction to apply the income for maintenance during minority:—*Held*, that the only child of A., who died under twenty-one, took a vested interest. *In re Bartholomew's Trust*, 566

LEGACY DUTY.

See LIGHTHOUSE.

LIGHTHOUSE.

The profits arising from the tolls received under a grant of a lighthouse, are in the nature of realty, and not liable to either probate or legacy duty. *The Attorney-General v. Jones*, 493

LOSS OF DOCUMENTS.

Where possible injustice, from the loss of documents or evidence, after a great lapse of time, may arise to a

party, the Court will give directions to the Master to state specially any difficulty he may find on the circumstances appearing before him. *Allfrey v. Allfrey*, 179

LUNACY.

1. The Act 1 Will. IV, c. 66, does not render it imperative on the Lord Chancellor, on the application of a curator bonis of a lunatic appointed by the Court of Session in Scotland, to order a transfer of stock standing in the lunatic's name in the Bank of England, (the property of the lunatic), into the curator's name. *In re Morgan*, 212

2. The Lord Chancellor will order payment by the Bank to the curator bonis, of the past dividends due on the stock, but not future dividends. 16.

3. An order, in the nature of a stop-order, to prevent a transfer without notice, of funds in court belonging to a lunatic, granted on the application of the mortgagee of the lunatic's next of kin. *Ex parte Kent, In re Peter Moore, a Lunatic*, 214

4. The former reports of the debts of a lunatic having been lost, the Master in Lunacy was directed to receive and consider any secondary evidence as to debts: the Master made his report accordingly, but did not therein state the grounds upon which he proceeded, whereupon it was referred back to the Master to state the evidence on which he based his report.

The debts of a lunatic under 10l. will not be directed to be paid to the solicitor, but to the committee of the lunatic. *In re Irdale*, 254

5. Principles on which the Court acts in providing for the personal management of a lunatic, with reference to the amount of his income, and the desirableness of his residing in his own house or at a lunatic asylum; and also in allowing expenses incurred by the committees, irregularly and

without authority, but by mistake, and with the sanction of the Master in Lunacy. *In re Brown*, 348

6. The costs and expenses incurred under and incidental to an order of reference to the Master in Lunacy, to inquire into the propriety of a contract entered into by the committees of a lunatic with a Railway Company, for the sale of a portion of the lunatic's lands, were directed to be paid by the Company under the 80th sect. of the Lands Clauses Consolidation Act, 1845. *In re Gawan Taylor*, 432

7. Where two petitions are presented in the same matter, the one first presented is entitled to be first opened. *In re Mallorie*, 435

8. Where two petitions are presented in the same matter, and answered by the *Lord Chancellor* on the same day, that which is first lodged in the Secretary's office, is entitled to be first opened. *In re Brookman*, 435

9. Where a lunatic, entitled for life to a considerable income, had been confined several years in an asylum, among the lowest class of patients, at a small annual expense, and without any particular attendance or comforts, and the accumulations from his income had been divided among his brothers and sisters, an order for the issuing of a commission was made, on the petition of a stranger, and the carriage of it was given to him; and a cross petition of two brothers of the lunatic was dismissed. *In re Anstie*, 313

I. Committee.

1. Notwithstanding the provisions contained in the Land-tax Redemption Act (42 Geo. 3, c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the *Lord Chancellor* before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising monies wherewith to redeem the land-tax. *In re Wade*, 202

2. It is no objection *per se* to the committees of the estate of a lunatic, that they reside at a distance from the lunatic's estate. *In re Brown*, 348

3. The 13th of the General Orders in Lunacy, of October, 1842, merely authorises, in certain cases, a reference to the Master in Lunacy, without a previous order of reference from the *Lord Chancellor*; but the report of the Master cannot be acted upon until it has received the sanction of the *Lord Chancellor*. *Ib.*

4. Where committees had exceeded their authority by expending large sums in draining, and in entering into an agreement with a Railway Company respecting the mode in which the railway should pass through the lunatic's estate, and in other particulars, but all those acts had been sanctioned by the Master in Lunacy, the Court refused to remove the committees. *Ib.*

5. The accounts of a lunatic's estate had been regularly passed before the Master in Lunacy, by the committees, in the presence of a solicitor, who acted for the mother of the sole heiress-at-law, and sole next of kin of the lunatic—the heiress, an infant, residing with her mother, and not having had any guardian appointed. A petition afterwards presented in the name of the infant heiress-at-law by her mother, who had then been appointed guardian by the Court of Chancery, to have the accounts re-opened, was dismissed, with costs. *Ib.*

6. The sanction of the *Lord Chancellor* ought to be obtained in all cases, by the committees of a lunatic, to a contract for sale of any portion of a lunatic's land to a Railway Company. *In re Gawan Taylor*, 432

7. An *ad interim* committee will not be ordered to execute a reconveyance of an estate vested in the lunatic as mortgagor. *In re Poulton*, 476

II. *Lunatic Mortgagee.*

Where a mortgage in fee had been executed with knowledge that the mortgagee was trustee only of the money advanced, and the mortgagee became lunatic, all such extra costs of procuring a reconveyance as were occasioned by the lunacy were thrown upon the mortgagor, and were not payable either by the lunatic or by the parties beneficially interested in the mortgage-money. *In re Lewes*, 123

III. *Supersedeas.*

1. In some cases, lunatics may be supposed to be entitled to the same kind of indulgence which the Court exercises in favour of infants, in disregarding matters of form, when necessary, in order the better to protect their interests; but a party applying for the *supersedeas* of a commission under which he has been found of unsound mind, cannot be considered entitled to such a privilege. *In re Dyce Sombre*, 285

2. The *Lord Chancellor*, under the particular circumstances appearing before him, being of opinion that a petition which had been presented, in the name of a lunatic, to supersede his commission, was not got up by the Petitioner and his solicitors, but by a third person, who had previously entered into an agreement to be paid a sum of money by the lunatic, in case he succeeded in superseding the commission, and whose conduct in other respects the *Lord Chancellor* highly disapproved, dismissed the petition. *Ib.*

MARRIAGE ARTICLES.

See INFANT.

MINING COMPANY.

See JOINT-STOCK COMPANIES WINDING-UP ACT (*Scope of Act*, 2).

MORTGAGE.

See BUILDING SOCIETY.

DEVISE, 1.

INCUMBRANCE.

LUNACY (*Lunatic Mortgagee*).

NOTICE.

W. insisted, in his answer to the Plaintiff's bill, that he was a purchaser for valuable consideration, without notice of the plaintiff's title; but admitted, that previously to his marriage in 1843, with his late wife, *R.*, who died in 1846, he had notice that the Plaintiff's late wife had, before her marriage, agreed to give up to *R.* a legacy of 2000*l.*, and that, in lieu thereof, *R.* had devised to the Plaintiff's late wife certain real estates, being the real estates conveyed to him by *R.* under a settlement executed on the occasion of the marriage of *W.* and *R.* A subsequent agreement in writing was entered into in 1835, previously to the marriage of the Plaintiff and his late wife, (who died shortly afterwards,) between *R.* and the Plaintiff's late wife, by which the Plaintiff's late wife absolutely released *R.* from the payment of the same legacy of 2000*l.*, and, in consideration thereof, *R.* agreed, by deed or will, to convey or devise absolutely her real estates to the Plaintiff and his late wife, to take effect on *R.*'s decease. The Plaintiff was in possession of the estates at the date of *W.*'s marriage with *R.* :—*Held*, that *W.* had that sort of knowledge which affected him with constructive notice of that which, (if the facts were proved to exist,) would shew that the Plaintiff had an equitable title by contract to the devised estates. *Penny v. Watts*, 266

OFFICIAL MANAGER.

See COSTS, 6.

PARTNERSHIP.

PARTIES.

See CORPORATION, 2.
INJUNCTION, 2.

PARTNERSHIP.

1. The administratrix of a deceased partner in a colliery, executed an assignment of all his shares in collieries and other personal estate, which were divided among and accepted by his daughters in equal shares, as their portions of his estate under the Statute of Distributions. The partnership affairs had not been wound up:—*Held*, that as the administratrix was still subject to the partnership liabilities, she was entitled to institute a suit against the surviving partners for the purpose of taking the partnership accounts; and that, notwithstanding her children were not parties to the suit. *Clegg v. Fishwick*, 390

2. Where two members of a partnership obtained a renewed lease of the partnership premises, and the administratrix of a deceased partner shewed a *prima facie* title to participate in the benefit of it, the Court protected the property until the rights of the parties could be decided, by appointing a receiver. *Ib.*

3. In the absence of any contract between partners, or any dealing from which a contract may be inferred, it will be assumed that the partners have carried on business on terms of an equal partnership; which implies not only an equal partnership *de facto* in profit and loss, but a right in each partner to claim and insist on such participation. Notwithstanding, however, partners have shared equally in profits and losses, the presumption of an equal partnership will be rebutted, if the entries in the books and accounts of the partnership, instead of absolute silence as to the shares of the partners, have described the shares in which the partners were entitled in the business,

PAWNBROKER. 671

as materially differing in amount and value. *Stewart v. Forbes*, 461

4. Entries in the books of a partnership are as conclusive of the rights of the partners, as if they had been found prescribed in a regular contract. *Ib.*

PATENT.

A bill was filed by a patentee against parties who had agreed to purchase from the sole licensee all his interest in the patent, and who were then carrying it on; and an injunction was moved for to prevent them from violating the covenants of the deed of license. They denied the utility of the patent, and stated that they did not intend to use it. The motion stood over, with liberty for the Plaintiff to bring an action at law:—*Held*, that he was not entitled to any admissions from the Defendants as to the validity of the patent, or as to their being licensees. *Pidding v. Franks*, 220

PAUPER.

Where a Plaintiff dismisses his own bill against a pauper Defendant, with costs, the Defendant is entitled to *dives* costs. *Rubery v. Morris*, 400

PAYMENT OF DEBTS.

See DEVISE, 1.

INFANT.

VOLUNTARY SETTLEMENT.

PAWNBROKER.

1. A loan of money exceeding 10*l.* (which was held not to be a pawnbroking transaction), upon the security of goods, upon such terms as to interest, &c. as are authorised by the usury laws (2 & 3 Vict. c. 37), is not invalid merely because the lender is a pawnbroker. *Fitch v. Rochfort*, 255

2. A loan by a pawnbroker of money exceeding 10*l.*, upon the security

of goods deposited, is not a pawn-broking transaction, merely on account of the character of the lender, nor because the agreement entered into reserves interest at 3d. a month for every 20s. lent, and stipulates, that, in case the goods are sold, the surplus shall be kept by the lender, if not claimed within three years, and that the goods may be delivered up to any party who produces the duplicate of the agreement and pays the debt; although these are the usual stipulations in pawnbroking transactions, *Fitch v. Rockford*, 256

PERPETUITY.

See CHARITY, 2.

PETITIONS.

1. Where two petitions in lunacy are presented in the same matter, the one first presented is entitled to be first opened. *In re Malloris*, 435

2. Where two petitions in lunacy are presented in the same matter, and answered by the Lord Chancellor on the same day, that which is first lodged in the Secretary's office, is entitled to be first opened. *In re Brookman*, 435

PLEADING.

See PARTNERSHIP, 1.

1. In a suit (*C. v. T.*) instituted by two of three parties entitled to the corpus of a trust fund after the death of their mother, the tenant for life, (one of the Plaintiffs being an infant,) against the three trustees, who had been guilty of a breach of trust, (*L. T.*, the mother, being one of the Defendants,) a decree was made, ordering the realization and payment of the misapplied trust funds by the trustees. *J. T.*, one of the trustees, being in contempt of Court for disobedience to the decree, filed his bill against his two co-trustees, and *L. T.* and her three children, stating the decree in *C. v. T.*, and insisting, as

against *L. T.*, that she was in fact the author of all the breaches of trust complained of in that suit, and had, as executrix of the testator, retained and misapplied to her own use certain parts of the testator's residuary estate, which ought to have come to the trust funds, and ought therefore to come in aid for the reimbursement of the trust estate, and that his co-trustees had imposed on him; and praying (*inter alia*) that he might be reimbursed, as far as might be, out of the interest coming to the tenant for life, from the consequences of the breach of trust of which he had been guilty through her co-operation; and generally, that he might be indemnified by the Defendants:—*Held*, that the second suit arose out of the exigency of the first suit, and embraced objects not touched by the decree in the first suit, but consistent therewith, and was not in the nature of a bill of review, and ought not to be taken off the file by reason of the leave of the Court not having been previously obtained for the purpose of filing the bill. *Taylor v. Taylor*, 437

2. It is not because there is something prayed for by a bill which cannot be granted, that the bill is to be taken off the file; but where the application is to take a bill off the file for irregularity, the matter to be considered is, whether it is inconsistent with the practice of the Court to allow such a bill to remain on the file, *Id.*

3. In *Bainbrigge v. Boddley* the test suggested whereby to try a question of this nature was, whether, if the first suit had not been taken notice of by the second suit, the first could be pleaded in bar of the second, and it could only be pleaded in bar of the second, if the matters in the two suits were the same. *Id.*

4. The ground of the decision in *Hodson v. Ball* was, that the nature

of the relief granted in the first suit, and of that prayed in the second suit, were such as could not co-exist. *Taylor v. Taylor*, 437

5. *Held*, also, that the fact of the Plaintiff in the second suit being in contempt for disobedience to the decree pronounced in the first suit, was not an objection to the institution of the second suit, or a ground for ordering a stay of proceedings in the second, until the decree in the former suit had been performed by the Plaintiff in the second suit. *Ib.*

PRACTICE.

See ANNULLING FIAT.

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INJUNCTION, 3, 8, 9.

IRREGULARITY.

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PRODUCTION OF DOCUMENTS.

REFERENCE.

RE-HEARING.

SUBSTITUTED SERVICE OF SUB-PENA.

1. A husband, in contempt for want of answer of himself and his wife, and against whom a writ of sequestration had issued, put in a separate answer without leave, and obtained an order that his contempt should be discharged on payment or tender of the costs of the contempt. A motion, by way of appeal, to discharge that order, was refused, the Plaintiff not having applied to take the answer off the file, and being therefore considered to have waived the irregularity. But the order was varied, by allowing the Plaintiff to take up the contempt at the point to which it had been already prosecuted, in case the answer

should not be sufficient. *Steele v. Plomer*, 149

2. Where two suits have been instituted in different branches of the Court, having relation to the same subject-matter, the Court will, as a general rule, direct the suits to be heard by the Judge in whose branch the first suit was instituted. *Elliott v. Lyne*, *Gibbard v. Pike*, 436

3. Where the Plaintiffs set up a title to a fund deposited with a Scotch bank in the name of the Defendant, who denied the Plaintiffs' title, and they were not in a position to move for the payment of the fund into court, or for an injunction to restrain the transfer of it, the Court refused to order the Defendant, on motion, to leave the deposit-receipt for the fund with the Clerk of Records and Writs, when the effect of such an order would be to deprive the Defendant of the power to deal with the fund in question. *The Corporation of Berwick v. Murray*, 452

PRIVATE COMMUNICATIONS TO JUDGE.

The light in which the Court regards private communications to a Judge, for the purpose of influencing his decision on a matter publicly before him. *In re Dyce Sombre*, 285

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them were privileged communications, and that they were, therefore, not bound to produce them:—*Held*, that, after the offer of production in the beginning of the answer, the Plaintiff was entitled to the production of all the documents mentioned in the schedule. *M'Intosh v. The Great Western Railway Company*, 41

2. The Defendant in his answer to a bill seeking discovery in aid of the Plaintiff's defence to an action at law, brought by the Defendant against him, stated that the letters, papers, and writings scheduled to his answer, contained the evidence on which the Defendant was advised and intended to rely at the trial of the action, and that the same did not, nor had any of them, "as the Defendant *was advised and verily believed*," contain any evidence whatever in support of the Plaintiff's pleas in the action; and that the same were not in any manner material to the Plaintiff's case:—*Held*, that the statement was a sufficient answer to the Plaintiff's motion for production and inspection of the scheduled documents. *Peile v. Stoddart*, 207

RAILWAY COMPANY.

See CORPORATION, 3.

INJUNCTION, 6.

LANDS CLAUSES CONSOLIDATION ACT.

LUNACY, 6.

RAILWAYS CLAUSES CONSOLIDATION ACT.

JOINT-STOCK COMPANIES WINDING-UP ACT (*Scope of*), 4, 5.

Where an Act of Parliament has been obtained by a Company for constructing a line of railway, and funds have been subscribed for that purpose, this Court will, on the application of a single shareholder, restrain the Company from applying those funds, or any part thereof, in the construction of a railway on a portion only of the

line, or otherwise than for the purpose and with the view of making and completing the entire line. *Cohen v. Wilkinson*, 554

RAILWAYS CLAUSES CONSOLIDATION ACT.

1. By a clause in a special railway Act, after reciting that plans and sections of the railway shewing the respective lines and roads thereof, and also books of reference containing the names of the owners, lessees, and occupiers of the lands through which the respective lines of railway were intended to pass, had been deposited with the clerks of the peace, it was enacted, that, subject to the provisions in that and the recited Acts contained, it should be lawful for the Company to make and maintain the railway and works in the line and upon the lands delineated on the said plans. On one of the plans so deposited was a cross section shewing the mode in which a particular street, in a large town, was to be carried over the intended railway by a bridge, and shewing also the intended approach to that bridge along the street to be an ascent of 1 in 40. The Railways Clauses Consolidation Act contained no restriction as to the height at which any bridge over a street was to be made, but only a restriction as to the ascent of a bridge to be made. In executing the works, the Company proceeded to make the approach to the bridge at an ascent of 1 in 115, by means of which they considerably raised the level of the street opposite the Plaintiff's premises, thereby obstructing the access thereto, and otherwise damaging the Plaintiff's enjoyment of his premises:—*Held*, that the Company had a right, under the Railways Clauses Consolidation Act, to raise the level of the street, and that they were not restricted from so doing by the clause in the special Act,

referring to the plans and sections deposited with the clerks of the peace. *Beardmer v. The London and North Western Railway Company*, 161

2. *Held*, also, that the deposited plans referred to in the special Act, *per se* constituted no obligation, and, unless incorporated in the Act, they created no right between the parties to the suit; the plans being deposited not for the purpose of exhibiting the surface appearance, but of shewing what was the *datum* line.

Ib.

3. The words, "engineering works," in the 14th sect. of the Railways Clauses Consolidation Act, mean other engineering works *ejusdem generis*—that is, other engineering works in the formation of the railway itself.

Ib.

4. Prior to the passing of a Railway Act, and for the purpose of inducing a landowner to withdraw his opposition to it, an agreement was made between him and the promoters of the Company, by which the amount of compensation to be paid to him, and the approaches to be made to the remainder of his premises, were referred to arbitration. An award was made, under which (among other things) the Company were required to make certain approaches from or near an existing bridge and turnpike-road:—*Held*, that the Company were not thereby precluded from exercising their powers, under the Railways Clauses Consolidation Act, of pulling down the bridge and building another near it, and of making the necessary deviation in the turnpike-road, such deviation being within the limits of the general Act. *Wood v. The North Staffordshire Railway Company*, 611

REFERENCE.

See CHARITY TRUSTEES.

Where, upon a petition, a reference is ordered to the Master to inquire

what parties are entitled to a fund in court arising from the purchase-money paid by a Company in respect of land taken by them, the order should contain the same directions for the production of documents and the examination of the parties, as if it had been made by a decree in a suit. *Hyde v. Edwards*, 552

RE-HEARING.

In an administration suit, the Master found that the testator's estate was insufficient to pay all the legacies in full, and on further directions they were ordered to abate proportionally. One of the legatees, who was not a party to the suit, being dissatisfied with the accounts taken in the Master's office, presented a petition of re-hearing, and obtained an order of course. The petition having been presented without the prior leave of the Court, was held to be irregular, and was ordered to be taken off the file. *Berry v. The Attorney-General*, 520

RESTRAINT ON TRADE.

See INJUNCTION, 10.

SEQUESTRATION.

See COSTS, 1.

SOLICITOR.

1. A solicitor who is a trustee, and who is made a party to a suit respecting the trust property in the character of trustee, will only be entitled to costs out of pocket if he acts for himself individually as solicitor; but the circumstance of his being a trustee will not prevent him from receiving his usual costs where he acts as solicitor in such a suit for any of the *cestuis que trust*, or where he acts for himself and his co-trustees or *cestuis que trust*, jointly, provided the costs are not increased by his being

was ordered to the Master to inquire and ascertain from what time a good title was shown, the payment of interest by the purchaser to commence from that time, and not earlier. *De Visne v. De Visne*, 408

3. In cases like the present, the principle strictly carried out, is, to postpone the payment of the purchase-money till the time when a good title was shown, the vendor being entitled to the rents up to that time, and the purchaser paying interest from that time; such time to be ascertained by the Master under the order of reference. *Ib.*

USURY.

See PAWNBROKER.

VOLUNTARY SETTLEMENT.

1. A testator, four years previously to his decease, assigned two policies of assurance effected by him on his life, for the benefit of a female with whom he had cohabited, and his four children by her. There was no allegation in the bill, which was filed on behalf of creditors to set aside the assignment, that the Plaintiff's debt was due at the time of the settlement, and there was no evidence of the state of the settlor's affairs, or of his being indebted at the date of the assignment,

except an I. O. U. for 200*l.*, produced by the Plaintiff:—*Held*, reversing the decree of the Court below, declaring the assignment void against creditors, that the proper course was, to direct inquiries before the Master, as to the debts of the testator at the date of the assignment, and the amount of his estate and effects at the same time. *Scarf v. Soulbey*, 426

2. To set aside a voluntary settlement at the suit of creditors, it is not necessary to shew the actual insolvency of the settlor at the date of the settlement, but the mere existence of debt at that time will not be sufficient, *per se*, to render it void. *Ib.*

WILL.

See DEVISE.

EXECUTORS.

LEGACY.

Under the provisions in the Wills Act, 1 Vict. c. 26, that every will shall be construed as if it had been executed immediately before the death of the testator, unless a contrary intention should appear by the will, it is not necessary that the intention should be expressed in terms, but it may be inferred by the Court, upon a fair and usual construction of the language of the will. *Cole v. Scott*, 477

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owner of houses, &c. the right to have his claim at once settled by a sheriff's jury, after notice in writing has been given by him to the Company; and the Court gave liberty to either party to apply, after the trial of the action, the parties undertaking to use the judgment under the direction of the Court. *The London and North Western Railway Company v. Smith*, 364

LECTURES.

See INJUNCTION, 4, 5.

LEGACY.

Bequest to trustees in trust to pay the annual income to A. for her life, and after her decease to assign the trust-fund to A.'s children, as and when they should severally attain twenty-one, in equal shares, to whom the testator gave the same accordingly, with benefit of survivorship, if any of them died before his share became payable; and a direction to apply the income for maintenance during minority:—*Held*, that the only child of A., who died under twenty-one, took a vested interest. *In re Bartholomew's Trust*, 565

LEGACY DUTY.

See LIGHTHOUSE.

LIGHTHOUSE.

The profits arising from the tolls received under a grant of a lighthouse, are in the nature of realty, and not liable to either probate or legacy duty. *The Attorney-General v. Jones*, 493

LOSS OF DOCUMENTS.

Where possible injustice, from the loss of documents or evidence, after a great lapse of time, may arise to a

party, the Court will give directions to the Master to state specially any difficulty he may find on the circumstances appearing before him. *Alfrey v. Alfrey*, 179

LUNACY.

1. The Act 1 Will. IV, c. 65, does not render it imperative on the Lord Chancellor, on the application of a curator bonis of a lunatic appointed by the Court of Session in Scotland, to order a transfer of stock standing in the lunatic's name in the Bank of England, (the property of the lunatic), into the curator's name. *In re Morgan*, 212

2. The Lord Chancellor will order payment by the Bank to the curator bonis, of the past dividends due on the stock, but not future dividends. *Ib.*

3. An order, in the nature of a stop-order, to prevent a transfer without notice, of funds in court belonging to a lunatic, granted on the application of the mortgagee of the lunatic's next of kin. *Ex parte Kent; In re Peter Moore, a Lunatic*, 214

4. The former reports of the debts of a lunatic having been lost, the Master in Lunacy was directed to receive and consider any secondary evidence as to debts: the Master made his report accordingly, but did not therein state the grounds upon which he proceeded, whereupon it was referred back to the Master to state the evidence on which he based his report.

The debts of a lunatic under 10*l.* will not be directed to be paid to the solicitor, but to the committee of the lunatic. *In re Iredale*, 254

5. Principles on which the Court acts in providing for the personal management of a lunatic, with reference to the amount of his income, and the desirableness of his residing in his own house or at a lunatic asylum; and also in allowing expenses incurred by the committees, irregularly and

without authority, but by mistake, and with the sanction of the Master in Lunacy. *In re Brown*, 348

6. The costs and expenses incurred under and incidental to an order of reference to the Master in Lunacy, to inquire into the propriety of a contract entered into by the committees of a lunatic with a Railway Company, for the sale of a portion of the lunatic's lands, were directed to be paid by the Company under the 80th sect. of the Lands Clauses Consolidation Act, 1845. *In re Gawan Taylor*, 432

7. Where two petitions are presented in the same matter, the one first presented is entitled to be first opened. *In re Mallorie*, 435

8. Where two petitions are presented in the same matter, and answered by the Lord Chancellor on the same day, that which is first lodged in the Secretary's office, is entitled to be first opened. *In re Brookman*, 435

9. Where a lunatic, entitled for life to a considerable income, had been confined several years in an asylum, among the lowest class of patients, at a small annual expense, and without any particular attendance or comforts, and the accumulations from his income had been divided among his brothers and sisters, an order for the issuing of a commission was made, on the petition of a stranger, and the carriage of it was given to him; and a cross petition of two brothers of the lunatic was dismissed. *In re Anstie*, 313

I. Committee.

1. Notwithstanding the provisions contained in the Land-tax Redemption Act (42 Geo. 3, c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the Lord Chancellor before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising monies wherewith to redeem the land-tax. *In re Wads*, 202

2. It is no objection *per se* to the committees of the estate of a lunatic, that they reside at a distance from the lunatic's estate. *In re Brown*, 348

3. The 13th of the General Orders in Lunacy, of October, 1842, merely authorises, in certain cases, a reference to the Master in Lunacy, without a previous order of reference from the Lord Chancellor; but the report of the Master cannot be acted upon until it has received the sanction of the Lord Chancellor. *Ib.*

4. Where committees had exceeded their authority by expending large sums in draining, and in entering into an agreement with a Railway Company respecting the mode in which the railway should pass through the lunatic's estate, and in other particulars, but all those acts had been sanctioned by the Master in Lunacy, the Court refused to remove the committees. *Ib.*

5. The accounts of a lunatic's estate had been regularly passed before the Master in Lunacy, by the committees, in the presence of a solicitor, who acted for the mother of the sole heiress-at-law, and sole next of kin of the lunatic—the heiress, an infant, residing with her mother, and not having had any guardian appointed. A petition afterwards presented in the name of the infant heiress-at-law by her mother, who had then been appointed guardian by the Court of Chancery, to have the accounts re-opened, was dismissed, with costs. *Ib.*

6. The sanction of the Lord Chancellor ought to be obtained in all cases, by the committees of a lunatic, to a contract for sale of any portion of a lunatic's land to a Railway Company. *In re Gawan Taylor*, 432

7. An *ad interim* committee will not be ordered to execute a reconveyance of an estate vested in the lunatic as mortgagee. *In re Poulton*, 476

